TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 34, 67.

THE COLUMBIA WATER POWER COMPANY, PLAINTIFF IN ERROR,

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED MARCH 6, 1907.

(16,608.)

(16,508.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 729

THE COLUMBIA WATER POWER COMPANY, PLAINTIFF IN ERROR,

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 8, 1897.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the chief justice and the associate justices of the supreme court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Columbia Water Power Company and The Columbia Electric Street Railway, Light and Power Company, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the
2 validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Columbia Water Power Company, as by its complaint appears, we, being willing that error, if any hath been, should be fully corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be
3 therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the ninth day of February, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Allowed by—
HENRY McIVER,
Chief Justice of the Supreme Court of the State of South Carolina.

4 [Endorsed:] The Columbia Water Power Company, plaintiff in error, against The Columbia Electric Street Railway, Light and Power Company, defendant in error. Writ of error. Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed 9 Feb., 1897, with copy. U. R. Brooks, clerk.

5 *Complaint.*

THE STATE OF SOUTH CAROLINA,
County of Richland.

In the Court of Common Pleas.

THE COLUMBIA WATER POWER CO., Plaintiff,
vs.
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER CO., Defendant.

Complaint for relief.

The plaintiff above named, complaining of the defendant above named, respectfully shows to the court:

1. That it is a corporation duly organized and created under the laws of the State of South Carolina on the 5th day of October, 1891.

2. That the canal known as the Columbia canal commences at a point in Broad river above the city of Columbia, in the county of Richland, and passes through the city of Columbia near the western boundary and empties into the Congaree river just beyond the limits of said city, passing around the shoals and falls in said river, and when constructed and in use made a continuous communication by water between said two rivers; that the construction of said canal was commenced by the State of South Carolina as a public work some time during the year 1824, and for the purpose of said construction the State of South Carolina acquired and purchased, among other lands, certain lands within the limits of Columbia, through which said canal was to be carried and constructed, being

6 that strip of land when the said canal was cut bounded south by the southern line of Plain street, north by the southern line of Blanding street, and having for its western and eastern boundaries the Congaree river and the eastern bank of said canal; that upon the construction of the said canal from its northern to its southern terminus by the State of South Carolina the plaintiff is informed that it was used by the public for the purpose of transportation and navigation and was so continued to be used until the same was discontinued by the State, and all of said property, including the strip of land between the streets aforesaid, remained the property of the State of South Carolina and continued in its possession until the times hereinafter mentioned.

3. That on the 8th day of February, 1882, the General Assembly of the State of South Carolina, by an act entitled "An act to author-

ize the canal commission to transfer and deliver to the board of directors of the South Carolina penitentiary the property known as the 'Columbia canal,' with the lands held therewith, and its appurtenances, and to develope the same," authorized and directed the transfer and delivery to the board of directors of the South Carolina penitentiary the property known as the "Columbia canal," together with the lands held therewith, and all and singular the rights, members, and appurtenances thereto belonging which had been hitherto, prior to that time, acquired by the State, and in the said act the said board of directors were authorized and directed, in behalf of the State, to take possession of said property, with its appurtenances, and to enlarge and develope the same for the sake of public improvement contemplated in the construction of said
7 canal, and thereupon the said board of directors took possession of the said canal property and all the lands of the State of South Carolina held with the said canal and acquired for its use and purposes, and among the lands was that strip of land, heretofore mentioned, lying between the southern line of Plain street, on the south, and the southern line of Blanding street, on the north, and between the eastern bank of said canal and the Congaree river, on the west, including the bank of said river; and the board of directors thereupon proceeded with the work of enlarging and develpoing the said canal, and for that purpose took possession of and used the lands hereinbefore mentioned, and, by the aid of appropriations made by the said State of South Carolina for that purpose, expended large sums of money in construction and development of the said property; and, in pursuance of said work, the said board of directors did widen and enlarge the banks of said canal and were in full and exclusive possession of said strip of land, all of which was used and required in the development of said property, and said board of directors remained in possession of the same until the time hereinafter mentioned without let or hinderance or interference from any person whatsoever and without any claim or assertion of any right of any kind whatsoever by any person or corporation against their title, interest, or possession thereto.

4. The plaintiff further alleges that at the time herein next below mentioned the State of South Carolina, through the said board of directors of the State penitentiary, was in full possession of all lands lying between Gervais street, on the south, and *and* Blanding
8 street, on the north, and the line of the said canal, on the east, and more particularly in the possession of all that strip of land between the southern line of Plain street and the southern line of Blanding street and lying west of the State penitentiary, as before mentioned, and that said property had been acquired for the uses and purposes of the said canal and was held along therewith.

5. That the General Assembly of the State of South Carolina, on the 24th day of December, 1887, passed an act entitled "An act to incorporate the board of trustees of the Columbia canal, to transfer to the said board the Columbia canal, with the lands now held therewith, and its appurtenances, and to develope the same," and that by

section 1 of said act the said board of trustees of the South Carolina penitentiary were authorized, directed, and empowered to transfer, assign, and release to the board of trustees of the Columbia canal, thereinafter created and provided for, the property known as the Columbia canal, together with the lands then held therewith and acquired under the acts of the General Assembly of said State with reference thereto or otherwise, and upon such transfer, assignment, and release all the right, title, and interest of the State of South Carolina in and to the said canal, all and singular the rights, members, and appurtenances thereto belonging, and all the lands held therewith, from its source, at Bull's sluice, through its whole length to the point where it empties in the Congaree river, together with all the appurtenances thereto belonging, should vest in the said board of trustees for the use and benefit of the city of Columbia for the purposes in said act mentioned; and in pursuance of such act the board of
9 directors of the South Carolina penitentiary, on the 1st day of February, 1888, did transfer, assign, and release unto the said board of trustees of the Columbia canal, their successors and assigns, all the right, title, and interest of the State of South Carolina in and to the said Columbia canal and all the lands held therewith in the terms and words used in said section of the above-stated act, and that thereupon the board of trustees of the Columbia canal did take possession of the said canal, its embankments, structures and works, and all appurtenances, together with the land then held and acquired for the use and development and each and every particular right, title and interest, and possession held by said State of South Carolina, through the said board of directors of the South Carolina penitentiary, in and to each and every piece, parcel, or tract of land theretofore used, claimed, or in possession of the same which was appurtenant to and used in connection with the said canal, and so remained in the uninterrupted, continuous, and exclusive possession thereof, without claim, demand, or any assertion of any right whatsoever upon the part of any one whatsoever in and to any interest herein until the date hereinafter mentioned.

6. That by section 21 of the above-mentioned act of the General Assembly, approved December 24th, 1887, the board of trustees was declared a body politic and corporate under the name "the board of trustees of the Columbia canal," and was authorized, among other things, to purchase, sell, or lease lands adjoining the canal for the purposes of the same, to sell or lease water power of the canal, subject to such rules and regulations as it should pre-
10 scribe, and exercise such powers given to it by said act of the General Assembly, and that by virtue of such act of incorporation and the powers conferred upon it the said board of trustees of the Columbia canal became entitled to the exclusive franchise and right to sell or lease water power developed by the said canal for the purposes of manufacturing and other industrial purposes and enterprises without let or hinderance whatsoever from any person or corporation or without the right upon the part of any person or corporation to interfere or interrupt in any manner the use of the said water power contained in the canal, save and except it should

provide a certain amount of horse-power of water power to certain persons and parties in said act nominated and mentioned; and in and by the rights and privileges transferred and given to said board of trustees to the Columbia canal no person or corporation had a right in any manner to divert, disturb, or impede or in any manner interfere with the flow of water in and down the said canal.

7. That by the 23d section of the last-mentioned act of the General Assembly of the State of South Carolina, as amended by the act approved December 24th, 1890, the board of trustees was given full power and authority, before the said canal should be developed, completed, and turned over to the city of Columbia, to sell, alienate, and transfer the same and all of its appurtenances, the lands held therewith, and all the rights and franchises conferred by said act on the board of trustees to any person or corporation, subject, however, to all the duties and liabilities imposed thereby, and subject to all the contracts, liabilities, and obligations made and
11 entered into by the said board prior to such sale and transfer, upon the approval and consent of nine members of the city council of the city of Columbia; and in *the* pursuance of such section the said board of trustees, before the completion of the canal and after the compliance with the requirements of said act authorizing such sale, did, on the 11th day of January, 1891, and while in the full and complete possession of all and singular the said property, rights, and franchises conveyed by the deed hereinabove mentioned, all of such property as had been in such possession, for valuable consideration, granted, bargained, sold, and released unto the said The Columbia Water Power Company, its successors and assigns forever, all that property situate, lying, and being in the State of South Carolina, in and near the city of Columbia, known as the "Columbia canal," and all the lands held therewith, acquired under the acts of General Assembly of said State with reference thereto or otherwise, from its source, at Bull's sl*u*ce, through its whole length to the point where it empties into the Congaree river, at or near the mouth of Rocky branch, including all lands, easements, rights of way, right of overflow, and appurtenances acquired by the board of trustees of the Columbia canal in the development and improvement of the said canal, together with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging or in anywise incident or appertaining, and together with all the rights and f*a*rnchises conferred by the acts of the General Assembly of the State of South Carolina on the said board of trustees of the Columbia canal; that immediately upon the execution
12 and delivery of the deed aforesaid the said Columbia Water Power Company went into possession of all and singular the property and lands last above described, and especially the lands and embankments lying between the south side of Plain street on the south and the south side of Blanding street on the north and between the walls of the South Carolina penitentiary on the east and a line extending southward therefrom and the Congaree river on the west, and so remain in possession of the same without let or

hindrance or interruption from any person whatsoever and without any claim or assertion of a right of any kind whatsoever upon the part of any one against the right, title, and possession of the plaintiff until the times hereinafter mentioned, and by virtue of such purchase and sale the plaintiff became entitled to and was vested with all the franchises, rights, privileges and immunities, and property conferred and given to said board of trustees in and by the said acts of the General Assembly of the State of South Carolina.

8. That the act of the General Assembly of the State of South Carolina approved December 24th, 1887, provided that upon the development and completion of the said canal the said board of trustees should furnish the State five hundred horse-power of water power at the State penitentiary, and the 23d section of said act, amended December 24th, 1890, provided that this duty should be imposed upon any person or corporation to whom the board of trustees should sell and transfer the said canal property; and this plaintiff alleges that on the — day of March, 1892, the development, enlargement, and completion of said canal was completed, and that on said day and ever since the plaintiff was and is ready to furnish the State with the five hundred horse-power of water power as required by the said act aforesaid.

13 9. That the defendant is and was at the time hereinafter mentioned a corporation duly chartered by an act of the General Assembly of the State of South Carolina approved December 16, 1891, under the name of the Columbia Electric Street Railway, Light and Power Company, hereinafter called the "electric company," said defendant company having been organized under the provisions of said act by the consolidation of the Columbia Electric Street and Suburban Railway and Electric Power Company and the Congaree Gas and Electric Company, the said consolidated company acquiring the property, franchises, and privileges of the Columbia Street Railway Company. The said Columbia Electric Street and Suburban Railway and Electric Power Company, a corporation *only* chartered and organized under an act of the General Assembly of the State of South Carolina approved December 24th, 1890, was authorized by its charter to build and construct through the streets of the city of Columbia a street railway and to operate their cars by electric power in the transportation of passengers and freights at such rates of speed as may be fixed. The said Congaree Gas and Electric Company, a corporation duly chartered and organized under an act of the General Assembly of said State approved the 24th day of December, 1887, *and* was authorized by said charter to construct and maintain a system of electric lighting — the city of Columbia, and at the time of said consolidation was in the possession and operation of a system of electric lighting; that the said Columbia Street Railway Company, a corporation organized under an act of the General Assembly of the State of South Carolina, was at the

14 time of said consolidation in the possession and operation of a street railway in the city of Columbia: that the defendant upon its organization and the consolidation aforesaid became possessed of the franchises and property of the last three mentioned

companies and continued in the operations thereof, and plaintiff alleges that the sole objects and purposes of the incorporation and organization of said company *was* for the profit and private gains connected therewith.

10. That on or about the — day of May, 1892, the board of directors of the South Carolina penitentiary, as officers and agents of the State, were informed and became aware of the readiness and ability of the plaintiff to furnish free of charge to the State of South Carolina the use of the five hundred horse-power of water power from the canal, in accordance with the terms of the act of the General Assembly of the State of South Carolina, and the plaintiff was informed by the said board and through the officers of the electric company that said company had been empowered and authorized by the said board of directors to build and construct a power-house, with forebay, flumes, and water wheels, for the purpose of utilizing the said five hundred horse-power so to be furnished to the State, and that it was the purpose of the said company to erect works under such authority sufficient to develop said five hundred horse-power of water power and to furnish to the State of South Carolina within the walls of the State penitentiary so much of the said power as had been agreed upon by and between the said board of directors of the penitentiary and the said company; that immediately thereupon this plaintiff gave due and proper notice to said board of directors and to the defendant acting under the authority of the said board of directors that it would object to the use of any of its lands or embankments on the west side of the canal by any person or corporation, except so much as would be necessary for the construction and erection of the said power-house, with forebay, flumes, and water wheels, for the furnishing of the five hundred horse-power of water power for the use of the State of South Carolina; but that the State of South Carolina or its agents, duly authorized, should have full liberty and right to enter upon and build such works upon the embankment of the canal necessary for actual use in furnishing and applying said water power, but such structure and works should be strictly confined to such portion of the embankment lands and property of the plaintiff as should be actually necessary for the State of South Carolina obtaining the use of the said five hundred horse-power of water power; and it further gave notice that the plaintiff would not in any manner or sense recognize, but, on the contrary, objected to and continued to object, and denied any right of the State to assign the said horse-power or any part thereof so to be furnished it to any person or corporation whatsoever to be used for private purposes outside of the walls of the penitentiary or in the public institutions of the State, or that it was under any liability or obligation or contract to permit, allow, or furnish water power from the said canal to be used by private corporations or persons conducting private enterprises for private profit or gain; and this plaintiff further charges and shows to the court that under said act authorizing the conveyance of said canal to the board of trustees of the Columbia canal, and other acts relating

thereto, that the use of said water power so to be furnished
16 to the State was intended to be and was solely provided for the purposes of use by the State itself in its public institutions, where the same was needful for supplying public wants and requirements, and was not intended, nor was it so provided or contracted for, for use by private individuals or corporations for private purposes, nor can the State, it is submitted, so divert as against the plaintiff the use of said water power for such private purposes, and *and* by means of such diversion bring itself into competition with the plaintiff in leasing water power for manufacturing or other industrial purposes, the exclusive right to do *so* which it had acquired and obtained by the purchase of said canal and franchises conferred upon such board of trustees of said canal under the acts above mention; nor can the same be assigned, either in whole or in part, by the State to private individuals or private corporations, nor was the said board of trustees or this plaintiff, its grantee, under any liability or obligation to furnish or supply any portion of said horse-power of water power for any other use or purpose than to the State in its said public institutions or for its public use.

11. That subsequent to such notification the defendant, acting as the duly authorized agent of the State, through the board of directors of the penitentiery, submitted specifications and plans for the construction and erection of a plant or works for obtaining or producing or making available the said water power, and the plaintiff did approve the same as not taking more or less embankment of land
than was necessary for the development or obtaining the five
17 hundred horse-power of water power for the use of the State, and did allow the defendant, as agent of the said State, to proceed with said work for the purpose of developing the said water power, as it was the intention, purpose, and desire of the plaintiff to perform all of the conditions, obligations, and terms of the said act of the General Assembly of the State of South Carolina authorizing the sale of said property, as it is its purpose and desire now to do; and, as plaintiff is informed, said work and construction was carried on and conducted on behalf of the State to its completion in accordance with the plans and specifications so submitted; that thereafter the said electric company, against the protests and objection of the plaintiff, proceeded to construct and place in said works machinery, &c., such a- generators, dynamos, &c., intended solely for the purpose of running its electric lights and street railway and furnishing various persons in the city of Columbia power for running various and divers industries; that this plaintiff has persistently and time and again insisted, protested, and given notice of objection to said use, and that proceedings would be taken as soon as practicable to prevent such misapplication by the said electric company, and the said company, notwithstanding such protests, continued and still continues to construct and place machinery in such power-house and in connection therewith for the purpose of running its electric street railway and other private purposes, and is now erecting and constructing and placing generators, dynamos, &c., in and upon said structures and property of this de-

fendant, to be used solely for the purpose of supplying power in lighting houses in no manner connected with the public in-
18 stitutions of the State or for their benefit or *or* use; and plaintiff is informed that this defendant proposes so to continue and so to act in defiance of the protests and objections of the plaintiff and in utter disregard of the rights of this plaintiff, and it is wholly remediless against such violation of its rights, except by the intervention of this court through its writ of injunction; that it is wholly without power to prevent the action of the defendant in the misapplication of said power in its use in running its said street railway and electric lights in the city of Columbia, owing to the duty of the plaintiff resting upon it of supplying and furnishing power for the use of the State in its penitentiary, as said power is furnished and made available at and by the same water wheel; that plaintiff cannot definitely ascertain the amount of water power that has been and is now being used so unlawfully by the defendant in its private business, but it alleges that unless said use be enjoined it will suffer irreparable injury and damage and its right and franchise to lease and sell water power for purposes of manufacturing and other industrial purposes will be materially affected and injured.

12. That the defendant, further conceiving and intending to injure this plaintiff in its franchises, privileges, and property by erecting, maintaining, and placing upon the embankments of its canal a steam-engine, with boilers, &c., for the purpose of generating and producing electric power as an auxiliary to its said works, and thereby increasing the amount of power that could be produced in said power station, and to furnish and supply the same to private persons and corporations for profit and gain, did on the — day of February, 1893, forcibly and wrongfully, and against the
19 objection and protest of the plaintiff, enter upon its said premises, to wit, upon its said western embankment of the canal, opposite the western walls of the State penitentiary, and at the southern end of the power-house hereinabove mentioned, and then and there did dig, excavate, and remove the earth, rock, and works composing the foundation of said embankment, to the great danger to the safety of the said canal and to the great damage to the said embankment, and did commence to erect the foundations for the steam-engine to be used in running generators, electric dynamos, &c., as above stated, and did erect walls, foundations, &c., for said engine-house, and has placed portions of machinery constituting said engine and is now engaged in the erection and placing of said engine and machinery in such structure so unlawfully erected and building a roof thereover, and has been and now is placing in such buildings in course of erection dynamos and other electric machinery, to be used in conjunction and in connection with said steam-engine in producing electric power, although the plaintiff aforesaid had protested and objected and still continues to protest and object to the unlawful and forcible entry upon the premises and the removal of its embankments and erection of machinery and buildings as aforesaid mentioned; but defendant, re-

gardless of such objections, warnings, &c., continues and is now placing and erecting such works and houses as aforesaid and will, unless restrained by this court, continue to so trespass upon and injure and build upon the property and premises of this plaintiff, to its irreparable damage and injury.

13. That on the — day of May, 1893, the defendant, against the objection, protest, and warning of the plaintiff, unlawfully,
20 forcibly, and in disregard of the rights of the plaintiff, entered upon its premises, to wit, the embankment of the canal and lands adjacept thereto, on the northern side of the said power-house, and has commenced to erect a boiler-house and coal-house, and that the same is now in the course of erection, and, plaintiff is informed, intends to proceed with such other and further structures and buildings, machinery, and appliances for use in the business of generating and applying electric power to run its lights and electric street railway in the said city of Columbia, and other gr-evious wrongs to the right of the plaintiff, and that the plaintiff is wholly without remedy to protect it in its rights against the forcible entry upon its premises and the erection of such buildings unless the same be enjoined and restrained by this court, and has suffered great damage and will suffer irreparable wrong in its rights, franchises, property, and privileges unless the defendant be restrained by this court.

14. Plaintiff further alleges that it has in every particular performed all of its obligations, conditions, and liabilities imposed upon it by the several acts of the General Assembly of the State of South Carolina and by all of its contracts, and stands ready and willing to continue and perform all such acts and things as by law or by contract it has oblicated itself to do; and it further shows to the court that it has informed, notified, and warned the defendant against the actions and things herein complained of, but that the defendant has, in utter disregard of every right of the plaintiff, forcibly and wrongfully trespassed upon its property, dug and excavated its embankment, placed obstructions upon it, inter-
21 ferring with the use and enjoyment of the franchises so granted it by the State, and has diverted and unlawfully used its right to the water power held and conveyed in said canal, and so continues to do.

15. The plaintiff further alleges that it is informed that the defendant has issued one hundred and fifty thousand dollars of bonds, secured by a mortgage upon all its property, and has included in said mortgage the works erected upon plaintiff's property and canal. Plaintiff further shows to the court, *to* the best information it can obtain, that if said bonds have been negotiated and passed into the hands of third persons such indebtedness far exceeds in amount the market value and price of all the property of said defendant, and is a prior lien to any claim or judgment that may be entered against it, and, should this plaintiff sue at law for damages against the defendant, such judgment would be worthless, as there would not be sufficient property after payment of said bonds to respond to the judgment so obtained.

16. That defendant therefore shows to the court that it is without remedy save in this honorable court against the wrongs and grievances hereinbefore complained of by the defendant, and that the damage done and about to be done to the said plaintiff is irreparable.

Wherefore the plaintiff prays the court for a temporary injunction restraining the defendant from using or attempting to use the five hundred horse-power of water power for the purpose of generating power to apply to the movements of its cars upon its
22 said street railway, for purposes of lighting its lamps or furnishing power motors, or any other private purposes, until a final hearing of this case, and on said final hearing said injunction to be perpetual.

Also for a temporary injunction to enjoin and restrain said defendant from further entering upon and erecting thereon structures, buildings, works, or machinery upon the aforesaid lands or premises of the plaintiff, or of further continuing the erection or building any structure or placing of any machinery upon said lands and premises of said plaintiff until a final hearing of this case, and that on such final hearing said injunction be made perpetual.

And that upon the hearing of this case an injunction be granted to this plaintiff, requiring the defendant to remove from its said premises all of said structures covering the steam-engine, boilers, and coal, and its said steam-engine and other machinery connected therewith.

And also that this court do assess such damages as has been done to this plaintiff in the premises, and that it may have judgment against the defendant for such amount.

And for such other and further relief as the circumstances of this case require and as to the court may seem meet and just.

ABNEY & THOMAS,
Attorneys for Plaintiff.

August 15th, 1893.

23 STATE OF SOUTH CAROLINA, }
County of Richland. }

Personally appeared before me, F. M. Rivers, who, being duly sworn, says that he is the superintendent of The Columbia Water Power Company, the plaintiff above named, and that each and every paragraph of the foregoing complaint is true of his own knowledge except paragraphs 2 and 15, which are stated on information and belief, and as to those paragraphs he believes it to be true. Deponent further says that the reason why the verification is not made by the plaintiff is that it is a corporation and has no directors resident in this State; that this deponent is, as above stated, an officer of the company, and that his knowledge is derived from having witnessed the transactions mentioned in the complaint and his communication with the defendant company concerning the matters and things in said complaint complained of; that the grounds of his belief are information communicated by reliable persons.

F. M. RIVERS.

Sworn to and subscribed before me this 15th day of August, 1893.

B. L. ABNEY,
Not. Pub., S. C.

Answer.

THE STATE OF SOUTH CAROLINA,
County of Richland.

THE COLUMBIA WATER POWER COMPANY, Plaintiff,
against
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, Defendant.

24 The defendant, by John T. Sloan, Jr., and Lyles & Muller, its attorneys, answering the complaint in the above-mentioned action:

I. Admits that, for the purpose of the construction of the Columbia canal, described in the second paragraph of the complaint, the State of South Carolina, through its board of public works, did acquire a strip of land lying within the boundaries described in said paragraph, said strip extending forty (40) feet in width each way from the centre line of said canal as at that time proposed and delineated upon the maps thereof, but it denies that the building and works and erections alleged to have been placed by this defendant upon the lands described in said paragraph at any point touched upon said strip of land, and it denies that the State of South Carolina or the board of directors of the South Carolina penitentiary or the board of trustees of the Columbia canal or the plaintiff itself ever acquired or held any part of said lot of land described in said paragraph of the complaint except the strip herein described in connection with or as belonging or appurtenant to the said Columbia canal; on the contrary, it alleges that the lot of land described in the said paragraph of the complaint was acquired by the State of South Carolina on the 18th day of October, 1866, under the provisions of an act entitled "An act to provide for the establishment of a penitentiary," approved the 21st day of September, A. D. 1866, whereby it was provided "that a commission, consisting of three persons, to be styled commissioners of the penitentiary, shall be appointed by his excellency the governor, whose duty it shall be to select and procure a proper site at some point, if practicable,

25 where water power may be available for manufacturing purposes within the enclosure on which to erect suitable penitentiary buildings with sufficient space to enlarge and improve the same from time to time as may be necessary," and that the premises upon which the buildings and works referred to in the complaint as having been erected by this defendant was the site of the workshops, water wheels, and other buildings used for the South Carolina penitentiary for the purposes of said institution; and this defendant denies that the plaintiff has any estate or interest in the premises

described in said second paragraph of the complaint except as above admitted.

II. It denies that the board of trustees of the Columbia canal ever became entitled to the exclusive franchise and right to sell or lease water power developed by the said canal for the purposes of manufacturing and other industrial purposes and enterprises, as alleged in paragraph 6 of the complaint, or that said board of trustees was ever possessed of the lot of land described in the complaint except as above admitted, and it denies that said board of trustees ever conveyed any portion of said land to the plaintiff herein except as above stated.

III. It denies that the five hundred horse-power of water power required to be furnished to the State of South Carolina was provided solely for the purpose of use by the State itself in its public institutions, and denies that it was not intended or provided for any use that the State of South Carolina might choose to put the same to. On the contrary, it alleges that by an act of the General Assembly, referred to in said complaint as constituting the board of trustees of the Columbia canal, it expressly provided that said
26 board should "furnish to the State, free of charge, on the line of the canal, five hundred horse-power of water power: Provided, that the right of the State to the said five hundred horse-power shall be absolute, and any mortgage, assignment, or other transfer of said canal by the board of trustees, or their assigns, shall always be subject to this right."

IV. It denies that this defendant ever intended to injure the plaintiff in its franchises, privileges, and property by the erection and maintenance of the engine, boilers, and other machinery referred to in the twelfth and thirteenth paragraphs of the complaint, and denies that said engine, boilers, and other machinery are located upon any land in which said plaintiff has any interest whatsoever. On the contrary, it alleges that said engine, boilers, and machinery were erected for the purpose of maintaining the power which the works so erected were calculated to develope from the use of the water power alleged in said complaint in case the said canal should be inadequate, on account of high water or any defect in said canal, to furnish the power required of it.

V. It denies that the issue of bonds by the defendant, referred to in the fifteenth paragraph of the complaint, was in excess of the reasonable and fair valuation of the property and franchise of this defendant covered by the mortgage securing said bonds. On the contrary, it charges that it believes that the allegations of the fifteenth paragraph of said complaint were made by the plaintiff maliciously and without any foundation whatsoever, not to effect any right that the plaintiff conceived itself to have in
27 the premises, but for the purpose of injuriously affecting this defendant in the legitimate transaction of its business and the management of its franchises and property.

VI. It alleges that the State of South Carolina, being seized and possessed in fee-simple of the lot or parcel of land described in the complaint, except the strip above described, and being entitled to

free and unrestricted use of the five hundred horse-power of water power referred to in the complaint, but being without means to conveniently develope the same by the board of directors of the South Carolina penitentiary, entered into a contract, dated 26th day of May, 1892, approved by the comptroller general of the State of South Carolina, with this defendant, whereby, among other things, it was stipulated that this defendant should erect upon the lands described in the complaint suitable work*d* and machinery for the development of the five hundred horse-power of water power so to be furnished to the State, as alleged in the complaint, and to furnish so much thereof as was conceived to be necessary for the purposes of the South Carolina penitentiary within the walls of that institution, and should be allowed to make use of the surplus power as the consideration for the erection of such works and machinery, which contract was thereafterwards ratified and approved by an act of the General Assembly of the State of South Carolina approved on the 24th day of December, 1892, and this defendant, under said contract, is entitled to the free and unrestricted use of the said five hundred horse-power of water power for the purposes contemplated by such contract.

JOHN T. SLOAN, JR.,
LYLES & MULLER,
Defendant's Attorneys.

28 STATE OF SOUTH CAROLINA, }
County of Richland. }

Personally appears J. Q. Marshall, who, being duly sworn, says that he is the president of the defendant corporation; that the foregoing answer is true of his own knowledge except as to those matters therein alleged on information and belief, the denials of the source of the title of the plaintiff being made by him upon information derived from the public statutes and records of the State of South Carolina.

J. Q. MARSHALL.

Sworn to and subscribed before me this 26th day of August, 1893.

WM. H. LYLES, [L. S.]
Notary Public.

Upon the pleadings being read O. W. Buch*nana*, Esqr., assistant attorney general of South Carolina, read the following suggestion, signed by D. A. Townsend, Esq., attorney general of South Carolina; articles of agreement between W. J. Talbert, superintendent of the South Carolina penitentiary, and the defendant, dated May 26th, 1892; deed of conveyance of realty from T. J. Rawls to the State of South Carolina, dated October 18th, 1866; and he further read A. A., September 21st, 1866, 13 Stat., 366; A. A., February 9th, 1882, 17 Stat., 873, and A. A., December 24th, 1892, 21 Stat., 94.

Suggestion.

THE STATE OF SOUTH CAROLINA,
Richland County.

In the Court of Common Pleas.

COLUMBIA WATER POWER COMPANY, Plaintiff,
vs.
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, Defendant.

And now comes the attorney general of the State of South Carolina and suggests to the court and gives it to understand and be informed (appearing only for the purpose of this motion) that
29 the State of South Carolina is not a party to this action and declines to become a party or to submit herself in any way to the jurisdiction of her own court.

And the said attorney general doth further suggest and bring to the attention of this honorable court that the defendant aforesaid is in possession of the strip of land described in the complaint by lease or license from the State of South Carolina, under agreement made between said defendant and the board of directors of the South Carolina penitentiary on the twenty-sixth day of May, 1892, herewith exhibited to the court, and approved and ratified by an act of the legislature of said State entitled "An act to ratify and confirm the contract made and entered into by and between the directors of the South Carolina penitentiary and the Columbia Electric Street Railway, Light and Power Company," &c., approved December 24th, 1892; that said strip of land was purchased for the use of said penitentiary on October 18, 1866, from Thomas J. Rawls and confirmed to the uses of said State penitentiary by an act entitled "An act to devote certain public lands to the use of the board of directors of the State penitentiary," approved February 9, 1882; that the power of generating works of the defendant corporation are built upon said strip of land, and are being now used in part in supplying power to said State penitentiary for operating necessary machinery within its walls under the agreement aforesaid.

And the said attorney general doth further suggest and show to this court that if the injunction prayed for in the complaint be granted the defendant will be prevented from carrying out its said agreement with the State of South Carolina, and the said
30 State, without a hearing in the cause, will be deprived of the water power she is entitled to in the manner she has contracted for and of the revenue she has secured, by and under the said agreement, for the period of thirty years.

Wherefore, without submitting the rights of the government of the State of South Carolina to the jurisdiction of the court, but respectfully insisting that the court has no jurisdiction of the subject

in controversy, he asks that the said complaint be set aside and all other proceedings in the case stayed and dismissed.

D. A. TOWNSEND,
Attorney General, South Carolina,
Per BUCHANAN.

Articles of Agreement.

Articles of agreement made and entered into by and between William Jasper Talbert, superintendent of the South Carolina penitentiary, on behalf of the board of directors of the South Carolina penitentiary, party of the first part, and the Columbia Electric Street Railway, Light and Power Company, party of the second part, witnesseth:

Whereas, at a regular meeting of the board of directors of the South Carolina penitentiary, held in the city of Columbia on the 17th day of May A. D. 1892, the following resolution was unanimously adopted, to wit:

"Whereas, under the acts of General Assembly providing for the transfer of the Columbia canal to the board of trustees and authorizing the sale thereof by said board of trustees, there was reserved for the State of South Carolina for the use of the South Carolina penitentiary, 500 horse-power on the line of said canal; and whereas to utilize said water power and make the same available for
31 the purposes of the penitentiary, it would require the expenditure of a large sum of money, which has not been provided for; and

"Whereas, the Columbia Electric Street Railway, Light and Power Company, in consideration of the privileges, uses and enjoyments hereinafter expressed, has offered to develope the same for the penitentiary, and the said proposition is deemed greatly to the advantage of the State of South Carolina, and also of the penitentiary; now, therefore, be it

"Resolved, by the board of directors of the South Carolina penitentiary, That the superintendent of the penitentiary, on behalf of this board, be, and he is hereby, authorized, empowered, and instructed to enter into a contract with the said Columbia Electric Street Railway, Light and Power Company, for the development of the said water power, upon the following terms, that is to say: The Columbia Electric Street Railway, Light and Power Company shall proceed to erect, so as to complete suitable waterways, water gates, and buildings, and to place suitable w-eels therein, within one year from the time of the signing of the cont-act, to utilize the entire amount of 500 horse-power of water power, and, for that purpose, all of the right, title, and interest of the State of South Carolina in and to the lands of the west side of the Columbia canal *is* to be rented to the said company for the term of thirty years from the time of the signing of contract and the said company is to be allowed to make use of the stone-work and stone and other material now upon said lands, provided none of such material be removed from the State property. That, in consideration of the work so to be done,

and the machinery and other property so to be furnished by the said The Columbia Electric Street Railway, Light and Power
32 Company, the said company is to be allowed free and uninterrupted use of all of said water power not required at any time for the use of the penitentiary; the amount reserved for the use of the penitentiary not at any time to exceed 100 horse-power, transmitted by the said company across the canal within the walls of the penitentiary. The said The Columbia Electric Street Railway, Light and Power Company is to pay to the board of directors of the South Carolina penitentiary the sum of $2,500 per annum for each and every year during the continuation of this contarct, commencing when the work aforesaid shall have been completed so as to be ready for the utilization of said water power, less a deduction of $5 per horse-power for each and every horse-power so reserved and used by the penitentiary as afo-esaid; payment to be made monthly, the contract to continue in force for the period of thirty years from the time of the signing of the contract, and at the expiration of such time, within six months after such expiration, the said company, if no agreement mutually satisfactory is entered into for the extension of this contract, is to have the privilege of removing all of its water wheels and other machinery, leaving the said penitentiary the use of the said 500 horse-power of water power, together with the works and buildings erected and gates."

And whereas, the Columbia Electric Street Railway, Light and Power Company has agreed to become a party to the said contract, for the purpose of developing the said water power.

Now, therefore, know all men by these presents:

First. That the said The Columbia Electric Street Railway, Light and Power Company, party of the second part, in considera-
33 tion of the premises, and in consideration of the rights, privileges, and immunities hereinafter set forth, covenants and agrees, at its own cost and expense, to build, erect, and complete on the western bank of the Columbia canal, opposite the South Carolina penitentiary, at or near the point where the water wheel of the South Carolina penitentiary formerly stood all necessary bulkheads, waterways, water gates, tail races, mason-work, and buildings, and to erect suitable water wheels thereon of the most modern and improved patterns, of sufficient capacity to utilize and develope the said five hundred horse-power of water power; the said work to be completed and ready for use within twelve months after the execution of this contarct; and the said party of the second part further covenants and agrees, at its own cost and expense, to maintain and operate the said water wheels for the development and utilization of the said five hundred horse-power of water power for and during the continuation of this contarct. And the said party of the second part further covenants and agrees to transmit across the said Columbia canal, to some convenient point within the walls of the said penitentiary, to be indicated by the superintendent thereof, so many horse-power, not to exceed the sum of one hundred horse-power, for the use and benefit of the said South Carolina penitentiary; the said power to be delivered, when required by the party of the first

part, at the point above indicated, from electric generators, or in such other form as the party of the second part may elect. Provided, however, that any inability to operate said water wheels and to develope the said horse-power, by reason of freshets in the river, or casualty to the canal or in any part of the said water
34 wheels, or parts appertaining thereto, will exonerate the party of the second part from the delivery of the power aforesaid to the penitentiary for and during such time as said interruption may continue; and, provided further, that any freshet in the river, or other casualty, which shall operate to diminish only the capacity of said water wheels, shall, to that extent, exonerate the party of the second part from delivering the power aforesaid to the said penitentiary, and in that event the power to be delivered to the said penitentiary shall be diminished in the same proportion as the capacity of the said water wheels has been affected. The power of the party of the second part to be also diminished in like proportion.

Second. That the said party of the first part, on behalf of the board of directors of the South Carolina penitentiary, covenants and agrees to allow to the party of the second part, for the purpose of the development of the said water power, the use and enjoyment of all the right, title, and interest that the State of South Carolina and the board of directors of the South Carolina penitentiary, by reason of the acts of the legislature hereinbefore referred to, have in and to all the land on the west side of the Columbia canal, between the said canal and the river opposite the walls of the said penitentiary, for and during the term of this contract. And as the party of the first part further covenants and agrees with the party of the second part, that the right, title and interest so conveyed is sufficient for the erection of said bulkheads, waterways, water gates, tail races, and buildings; and further agrees to allow to the said party of the second part, to be used in the erection of the said work, all the stone masonry and other material now on
35 the said land, together with the privilege of quarrying and using such other stone, earth, and other material as may be necessary for the erection and proper execution of said work; and the party of the first part further covenants and agrees that the said party of the second part shall have, for and during the continuation of this contract, the free and uninterrupted use and enjoyment of the right of way along the banks of the said canal to and from Gervais street to the works so to be erected. And the party of the first part, in consideration of the covenants and agreements by and on the part of the party of the second part, hereby further covenants and agrees to allow the said party of the second part the free and uninterrupted use of the said 500 horse-power of water power so reserved by the State of South Carolina for the use of the South Carolina penitentiary, saving and excepting the 100 horse-power of water power so reserved for the use of the penitentiary, as hereinbefore stated.

Third. And the said party of the second part, in consideration of the premises, and further in consideration of the use of the said 500

horse-power of water power, hereby covenants and agrees to pay to the said party of the first part the sum of $2,500 per annum for each and every year during the continuation of this contract, commencing when said work shall have been completed and ready for use, less a deduction of $5 per horse-power for each and every horse-power transmitted in the manner and the form aforesaid by the party of the second part for the use of the party of the first part—the said payments to be made in monthly instalments and payable at the end of each and every month.

36 Fourth. And it is mutually agreed by and between the parties hereto that this contract shall continue and be of force for and during the period of thirty years from the date of the execution of the contract; provided, however, that at the expiration of said period this contract may be continued upon such terms as may be mutually agreed upon by and between the parties thereto; and in the event that the said contract be not continued, the said party of the second part shall have the right, within six months after the expiration of said contract to remove the water wheel and all other machinery by the said party of the second part furnished and erected under the terms of this contract, leaving, however, for the use of the said penitentiary all mason-work, bulkheads, waterways, tail races, and buildings which shall have been erected; and provided, further, that should any payments for and on account of the use of the said water power be in arrears and unpaid for a period of six months, then and in that event the said party of the first part, upon one month's notice to the party of the second part, shall have the right to terminate this contract, and the rights of the parties thereto to be fixed as though the contract had terminated by its own limitation as above set forth.

In witness whereof, the party of the first part has caused these presents to be executed in duplicate by William Jasper Talbert, superintendent, and the corporate seal of the South Carolina penitentiary, on behalf of the board of directors of the South Carolina penitentiary; and the party of the second part has caused

37 these presents to be executed in duplicate by J. Q. Marshall, president, and the corporate seal of the said company to be affixed 26th May, 1892.

[SEAL.] W. J. TALBERT,
Sup't S. C. P.

Witness-:
W. W. ADAMS.
J. EUGENE JARNIGAN.

By order board of directors.
[SEAL.] J. Q. MARSHAL, *President.*

(Duly proved.)
Approved.

W. H. ELLERBEE,
Comptroller General.

I approve the form and execution of the foregoing contract.

JOHN L. McLAURIN,
Att'y General of S. C.

* * * * * * *

The assistant attorney general moved that the suggestion, articles of agreement, and deed from Rawls to the State, above mentioned, be filed. He stated that he appeared for the purpose of this motion only, and refused to move that the State be made a party to the action or to consent thereto. The presiding judge ordered that the motion to file be granted.

Mr. Shand, for the defendant, objected to the jurisdiction of the court on the grounds:

1. That the cause could not proceed without the State being made a party.
2. That the State is an indispensable party.
3. That the State cannot be made a party.

* * * * * * *

38 *Decree.*

THE STATE OF SOUTH CAROLINA,
Richland County.

In the Court of Common Pleas.

THE COLUMBIA WATER POWER COMPANY, Plaintiff,
against
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, Defendant.

This cause came on to be heard before me at the present term of the court and has been fully argued.

As to the question raised that the court has no jurisdiction because that the State is an indispensable party, this plea is overruled. The court has jurisdiction. The defendant is a lessee of the water power reserved by the State, and the court can construe a contract made between the defendant and the State whereby it is claimed that the rights of the plaintiff have been affected. The door is not shut to plaintiff because of the contract with the State; the State has a right to come in if she so wishes, but she declares that she will not come in, and the cause can be heard without her presence.

As to the Rawls deed, that deed conveys the property to the State; but subsequently the State conveyed the canal property to the plaintiff and thereby conveyed in fee all of the property known as the "canal property," including its banks, as it existed at the time of the conveyance; and at the time of the act of 1887 and of the conveyance made thereunder the canal property covered the land upon which the defendant's works are erected.

39 Plaintiff acquired its rights under the act of 1887. It is not the grantor of anything to the State, but the State has reserved out of its grant five hundred horse-power of water power, and that much the plaintiff did not purchase. The whole question

turns on the reserved right of the State. The defendant holds a lease from the State, and the contract made by the defendant with the board of directors of the State penitentiary, approved and ratified by the State, has given to the defendant all of the rights which the State had in that five hundred horse-power.

In the act of 1887 there is a distinct reservation of an absolute right to the State of 500 horse-power of water power. Call it an easement, or what you will, it is absolute. Now, can the State dispose of it? Unquestionably she can. She can develope it, she can erect the necessary buildings for its utilization, and can utilize it. She may do it in any way she pleases. She may use old wheels or she may use new and improved methods, and may resort to electricity, which is now generally regarded as an improved method of transmitting water power; therefore there is no objection to the electric plant erected by the defendant under its contract with the State.

Now, can the State lease its power and permit the lessee to use it and supply the State at the cost of the lessee? I think it can. The State is not always ready for carrying on such work; therefore she could lease it, and, in this particular case, the State gets or may get 100 horse-power and the lessee the balance. This being a consideration moving to the lessee, the lessee can devote that consideration to its own use; therefore, under the act, the defendant, as lessee of the State, has the unquestionable right to put the electric plant on the banks of the canal of the penitentiary, and to carry out the contract which has been made between it and the State of South Carolina.

Now, has the defendant the supplementary right to put in a steam plant? Prudence and foresight justifies its erection on the banks of a canal along a river where freshets come, and where time is important there might be serious interruption to the industries of the defendant company, and thus of the penitentiary; therefore the defendant has a right to use so much steam plant as is necessary to supplement its water power at such times as the water power is unavailable by reason of freshets or necessary repairs to the canal or other causes. The dam may break, rains may swell the river, and there might be a long interruption to the use of the water power, and it would be necessary to resort to the steam plant to carry on the work. It is common to use steam as an adjunct to water-power plants. The defendant cannot erect any more steam plant than is necessary to its work as a supplement to the water power which it has received from the State.

I therefore hold that there has been no violation of the State's contract with the plaintiff. That reservation of the State's water power is a part of the contract made with the plaintiff, and that reservation is absolute; therefore I hold that the complaint must be dismissed.

It is therefore ordered and adjudged that the complaint be dismissed.

J. H. HUDSON,
Presiding Judge.

November 11, 1893.

41 On the 21st day of November, 1893, and within ten days after the rising of the court, the plaintiff served the defendant with the following:

Notice of Intention to Appeal.

STATE OF SOUTH CAROLINA, }
Richland County. }

In the Court of Common Pleas.

THE COLUMBIA WATER POWER COMPANY, Plaintiff,
vs.
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, Defendant.

To Messrs. John T. Sloan, Jr., Lyles & Muller, and R. W. Shand, defendant's attorneys:

The plaintiff gives notice of its intention to appeal to the supreme court of the said State from so much of the decree of his honor J. H. Hudson herein dated and filed November 11th, 1893:

1. As holds that the defendant is a lessee of the water power reserved.

2. As holds that there is any valid contract between the State and the defendant.

3. And from all the portion of the decree commencing with and inclusive of the sentence, "Plaintiff acquired its rights under the act of 1887," and ending with and inclusive of the sentence, "Therefore I hold that the complaint must be dismissed."

4. And from his honor's ordering and adjudging that the complaint be dismissed.

ABNEY & THOMAS,
BACHMAN & YOUMANS,
Plaintiff's Attorneys.

November 21st, 1893.

42 And on the 21st day of November, 1893, the defendant served the following notice and exceptions upon the plaintiff:

THE STATE OF SOUTH CAROLINA, }
Richland County. }

In the Court of Common Pleas.

THE COLUMBIA WATER POWER COMPANY, Plaintiff,
against
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, Defendant.

To Messrs. Abney & Thomas and Messrs. Bachnam & Youmans, plaintiff's attorneys:

You will please take notice that the defendant excepts to the decree of his honor J. H. Hudson, circuit judge, filed in said cause

and dated the 11th day of November, 1893, upon the grounds stated below, and will urge the errors of his honor in these particulars upon any appeal to the supreme court from the degree therein as additional reasons why the order of the court dismissing the complaint should be sustained, to wit:

1. Because he held that the State of South Carolina was not an indispensable party to said cause, and that the court could proceed to judgment therein without the presence of the State as a party to said cause.

2. Because he held that the plaintiff was seized in fee of the land upon which the works were erected by defendant.

JOHN T. SLOAN, JR.,
R. W. SHAND,
LYLES & MULLER,
Defendant's Attorneys.

Columbia, S. C., November 21st, 1893.

43 In pursuance of said notice of appeal by plaintiff, the plaintiff makes and serves the following exceptions for the purpose of said appeal to the supreme court:

Exceptions.

Excepts because his honor the presiding judge erred in holding:

1. That there is a valid lease of the water power reserved by the State.

2. That a valid contract was made between the defendant and the State.

3. That all of plaintiff's rights were acquired under the act of 1887.

4. That defendant is the lessee of a valid lease from the State.

5. That the contract made by defendant with the board of directors of the State penitentiary, approved and ratified by the General Assembly, has given to the defendant all of the rights which the State had in the five hundred horse-power of water power.

6. That in the act of 1887 there is a distinct reservation to the State of a right of five hundred horse-power of water power—"call it an easement or what you will"—absolute in the sense and with the force and effect in which that term is apprehended in the decision.

7. That the State can dispose of its right to the five hundred horse-power of water power in any way the State pleases.

8. That there is no objection to the electric plant erected by the defendant, and the reasons given for this conclusion.

44 9. That the State can lease its power and permit the lessee to use it and supply the State at the cost of the lessee, and the reasons given for this conclusion.

10. That the lessee can devote what is styled the consideration moving to the lessee, to wit, the balance of the horse-power after what of it the State gets to its own use, and the conclusion drawn

therefrom that the defendant as lessee of the State has the unquestionable right to put the electric plant on the banks of the canal at the penitentiary and to carry out the contract which has been made between it and the State as if it were a valid contract.

11. That the defendant has a supplementary right to put in a steam plant on the plaintiff's canal property.

12. That defendant has a right to erect on plaintiff's canal property and use so much steam plant as is necessary to supplement defendant's water power at such times as the water power is for any cause unavailable, and the reasons given for this conclusion.

13. That there has been no violation of the State's contract with the plaintiff.

14. That it is a part of the contract of the State with plaintiff that the reservation of the State's water power is absolute in the sense and with the force and effect in which that term is apprehended in the decision.

15. That the complaint must be dismissed.

16. That his honor erred in ordering and adjudging that the complaint be dismissed.

Excepts because his honor did not decide—

45 17. In clear and distinct terms, that the plaintiff is the owner in fee of all that strip of land lying between the southern line of Plain street on the south and the southern line of Blanding street on the north and between the eastern bank of the Columbia canal and the Congaree river, including the bank of said river, as portion of its canal property.

18. That the plaintiff has the sole and exclusive right, franchise, and privilege to sell and lease water power developed by the Columbia canal.

19. That the plaintiff on and from the — day of March, 1892, was and ever since has been and is ready to furnish to the State the 500 horse-power of water power in accordance with A. A., December, 24th, 1887, and that the State and the board of directors of the South Carolina penitentiary have been since the said — day of March, 1887, informed of and aware of the same.

20. The matters alleged in paragraph 10 of the complaint as there alleged, page 9, fol. 33.

21. That the A. A., December 24th, 1892, mentioned in the sixth paragraph of the complaint, is in violation of section 10, article 1, Constitution of the United States, declaring that no State shall pass any law impairing the obligation of contracts, in this, that it impairs the contract made by the State in A. A., December 24th, 1887, as to the rights, franchises, and privileges of the owners of the property known as the Columbia canal and the lands held therewith as owners in fee thereof, and more especially as to the sole and exclusive right, franchise, and privilege to sell and lease the water power developed by said canal.

46 22. That the defendant should be confined at most to such plant and work as were constructed and done in accordance with the specifications and plans submitted by defendant to and approved by plaintiff.

23. That the erection of the steam plant and the entire machinery thereof by defendant was in utter violation of the property rights of plaintiff.

24. The matter alleged in paragraph 15 of the complaint as there alleged, page 14, fol. 55.

25. That the 500 horse-power of water power to which the State is entitled under A. A., December 24th, 1887, belongs to the State, as State, for the use of the South Carolina penitentiary for State public purposes exclusively, is attached to and not severable from the State, as State, for the use of the penitentiary, and to be used for said purposes and said purposes only.

26. That all claims based on any severance or attempted severance of the right to said 500 horse-power of water power from the State for the use of the penitentiary for said purposes by the person in whose favor said severance is made or attempted to be made are invalid in law.

27. That the canal property on said severance being made or attempted to be made is, as matter of law, released from the servitude or easement imposed on it as the servient tenement by the A. A. of December 24th, 1887, or otherwise.

47 28. That the plaintiff has complied with all the obligations in the premises to which it was subjected by the A. A. of December 24th, 1887, or otherwise.

29. That his honor erred in not granting a perpetual injunction restraining defendant from using or attempting to use the 500 horse-power of water power for the purposes of generating power to apply to the movements of its cars upon the street railway, for lighting its lamps or furnishing power motors, or any other private purpose.

30. In not granting an injunction to enjoin and restrain defendant from entering upon and erecting on the lands or property of plaintiff any structures, buildings, works, or machinery save as is in accordance with the plans and specifications submitted by defendant and approved by plaintiff.

31. In not requiring defendant to remove from the lands and property of plaintiff all of defendant's structures covering the steam-engine, boilers and coal, and its steam-engine and all machinery and property connected therewith.

32. In not ordering an assessment of the damages done by defendant to plaintiff in the premises and adjudging plaintiff's right to have said damages.

33. In not retaining the complaint.

ABNEY & THOMAS,
BACHMAN & YOUMANS,
Attorneys for Appellant.

December 21, 1893.

48 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, Richland County.

THE COLUMBIA WATER POWER COMPANY, Plaintiff, Appellant,
against
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, Defendant, Respondent.

Opinion.

EUGENE B. GARY, *A. J.:*

The view which the court takes of this case renders it unnecessary to trace the history of the Columbia canal prior to the year 1887, when the act was passed entitled "An act to incorporate the board of trustees of the Columbia canal, to transfer to the said board the Columbia canal, with the lands now held therewith, and its appurtenances, and to develope the same," the first and seventh sections of which are as follows:

SECTION 1. "That the board of directors of the South Carolina penitentiary are hereby authorized, empowered, and required to transfer, assign, & release to the board of trustees of the Columbia canal, hereinafter created and provided for, the property known as the Columbia canal, together with the lands now held therewith, acquired under the acts of the General Assembly of this State with reference thereto or otherwise, all and singular the rights, members and appurtenances thereto belonging, and upon such transfer,
49 assignment and release, all the right, title and interest of the State of South Carolina in and to said Columbia canal and the lands now held therewith from its source at Bull's sluice through its whole length to the point where it empties into the Congaree river, together with all the appurtenances thereto belonging, shall vest in the said board of trustees for the use & benefit of the city of Columbia, for the purposes hereinafter in this act mentioned, subject, nevertheless, to the performance of the conditions & limitations prescribed on the part of the said board of trustees and thier assigns." * * *

SECTION 7. "That the board of trustees shall, within two years from the ratification of this act, complete the said canal so as to carry a body of water, * * * and furnish to the State, free of charge, on the line of the canal 500 horse-power of water power, to Sullivan Tenner or assigns 500 horse-power of water power, under his contract with the canal commission and to furnish the city of Columbia 500 horse-power of water power at any point between the source of the canal & Gervais street the city may select; and shall, as soon as practicable, complete the canal down to the Congaree river a few yards above the mouth of Rocky branch: Provided, that the right of the State to the free use of the 500 horse-power shall be absolute, and any mortgage, assignment, or transfer of the said canal by the said board of trustees, or their assigns shall always be subject to this right."

In pursuance of said act the board of directors of the South Carolina State penitentiary on the first day of February, 1888,
50 did transfer, assign, and release unto the said board of trustees of the Columbia canal, their successors and assigns, all the right, title, and interest of the State of South Carolina in and to the said Columbia canal and all the lands held therewith in the terms and words of said act and upon the conditions therein stated.

The board of trustees of the Columbia canal thereupon took possession of the canal and the property connected therewith.

At the time of the passage of the act of 1887 the State, through the directors of the penitentiary, was in possession of the property which included the strip of land upon which the water-power plant & steam plant were erected.

In 1890 an act was passed which authorized the board of trustees of the Columbia canal to sell said property subject to all the duties & liabilities imposed by the act of 1887.

The plaintiff holds under a deed made by the board of trustees of the Columbia canal under the above-mentioned act.

On the 26th day of May, 1892, the State, through the directors of the penitentiary, and the defendant entered into a contract by which the State agreed to allow the defendant the free & uninterrupted use of the said 500 horse-power of water power reserved by the State for the use of the penitentiary, saving and excepting the 100 horse-power of water power reserved to the penitentiary, as stated in said contract.

For the use of said 500 horse-power of water power the
51 subdefendant covenanted and agreed to pay to the State $2,500.00 per annum for the time therein specified.

In 1892 this contract was ratified by the legislature by an act entitled "An act to ratify and confirm the contract made and entered into by & between the board of directors of the South Carolina penitentiary and the Columbia Electric Street Railway, Light and Power Company for the developement of the 500 horse-power of water power reserved by the State of South Carolina for the use of the South Carolina penitentiary along the line of the Columbia canal."

The case came on for a hearing before his honor J. H. Hudson, presiding judge, at the October (1893) term of court for Richland county.

Upon the pleadings being read O. W. Buchanan, Esq., assistant attorney general of South Carolina, read the suggestion, which will be incorporated in the report of the case, signed by D. A. Townsend Esq., attorney general of South Carolina; articles of agreement between W. J. Talbert, superintendent of the South Carolina penitentiary, and the defendant, dated 26th May, 1892; deed of conveyance of realty from T. J. Rawls to the State of South Carolina, dated October 18th, 1866; and he further read A. A., Sept. 21st, 1866, 13 Stat., 366; A. A., Feb'y 9th, 1882, 17 Stat., 873, and A. A., Dec. 24th, 1892, 21 Stat., 94.

The assistant attorney general moved that the suggestion, articles of agreement, and deed from Rawls to the State above mentioned be filed. He stated that he appeared for the purpose of the motion

only and refused to move that the State be made a party to the action or to consent thereto.

52 The presiding judge ordered that the motion to file be granted.

Defendant's attorneys then objected to the jurisdiction of the court on the grounds:

1. That the cause could not proceed without the State being made a party.

2. That the State is an indispensable party.

3. That the State cannot be made a party.

The presiding judge stated that he would hear further argument on the question of jurisdiction after the testimony was heard, in the general argument of the case, and ordered that the testimony be proceeded with. After the testimony was closed & argument heard by the presiding judge he rendered his decree, which, along with plaintiff's exceptions thereto, will be set forth in the report of the case.

The defendant, in accordance with the proper practice, gave notice that it would endeavor to support the judgment of the court below upon the two additional grounds:

"1st. Because he held that the State of South Carolina was not an indispensable party to said cause, and that the court could proceed to judgment therein without the presence of the State as a party to said cause."

"2nd. Because he held that the State was seized in fee of the land upon which the works were erected by the defendant."

The complaint alleges two causes of action, one for injunction, on the equity side of the court, the other alleging title in the plaintiff and claiming damages for alleged injuries by reason of the unlawful entry upon its land and the erection of a steam plant

53 in connection with the water-power plant.

Heyward *v.* Farmers' Mining Co., 19 S. E. R., 963:

In the consideration of this case it must be borne in mind that there is a difference where the action is in effect a suit against the State and where the State is an indispensable party.

This distinction is mentioned in the case of *In re* Ayers, 123 U. S., at page 500, where it is said: "But the very ground on which it is adjudged not to be a suit against the State and not to be one in which the State was a necessary party was that the defendants personally & individually were wrong-doers against whom the complainants had a clear right of action for the recovery of the property taken, or its value, and that therefore it was a case in which no other parties were necessary."

Section 143 of the Code shows who are indispensable parties. It provides that "the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others; but when a complete determination of the controversy cannot be had without the presence of other parties the court must cause them to be brought in."

In Foster's Federal Practice it is shown that a different rule pre-

vails as to parties in equitable actions and those on the law side of the court. That author, in section 37, p. 76, says: "In actions at law * * * where an individual is sued as for injuries to persons or property, real or personal, * * * the Government does not stand behind him to defend him. If he has the authority
54 of law to sustain him in what he has done, like any other defendant, he must show it to the court and abide the result. In either case the State is not bound by the judgment of the court, and generally its rights remain unaffected.

It is no answer for the defendant to say, I am an officer of the Government and acted under authority, unless he shows the sufficiency of that authority.

Courts of equity proceed upon different principles as to parties.

In accordance with these views, it was held in the case from which the foregoing extracts are taken that a suit by a bondholder against the officers of a State and a railroad company whose bonds he held to have a sale of mortgaged property to the governor of Georgia, claiming to act in his individual capacity, declared void upon the ground that the governor was not authorized to bid in said property for the State, and the State had no constitutional power to make the purchase, could not be *mentioned*."

One of the objects of the plaintiff's action herein is to have declared null and void the contract between the State and the defendant as to the 500 horse-power of water power on the ground that the State could not lease the same.

The case of Cunningham *vs.* Mason & Brunswick R. R. Co., 109 U. S., 446, shows that the State is an indispensable party, and if she refuses to become a party the action will be dismissed for
55 want of jurisdiction. In that case the court says: "This principle is conceded in all the cases, and whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction." Again, "As was said in Barney *vs.* Baltimore, 6 Wall., 280, there are *presons* who are merely formal parties without real interest, and there are those who have an interest in the suit, but which will not be injured by the relief sought, and there are those whose interest in the subject-matter of the suit renders them indispensable as parties to it. Of this latter class the court said in the case of Shields *vs.* Barrow, 17 How., 130: 'They are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience.' 'In such cases,' says the court in Barney *vs.* Baltimore, 6 Wall., 280, 'the court will refuse to entertain the suit when these parties cannot be subjected to its jurisdiction.'"

The complaint and the suggestion filed by the attorney general show that the State has interests which would be affected by granting the relief prayed for in the complaint. To grant such relief would have the effect of cloggong the wheels of one of the branches of the State government, to wit, its penitentiary.

In the case of Hagood *vs.* Southern, 117 U. S., at p. 71, the court says: "The defendants in the present case, through officers of the State, are not authorized to enter its appearance to the suits
56 and defend for it in its name. The complainants are not entitled to compel its appearance, for the State cannot be sued without its consent; and the court cannot proceed to the determination of a cas*ue* and controversy to which the State is an indispensable party without its presence. * * * The suggestion that it has had the opportunity and invitation to appear is immaterial, for it has a constitutional right to insist on its immunity from suit."

It clearly appears that the State is an indispensable party.

It is urged, however, that the objection is not properly interposed. This objection is jurisdictional in its nature, and in the case of Lowry *vs.* Thompson, 25 S. C., 419, the supreme court, of its own motion, raised such objection, which was sustained.

The State being an indispensable party, and refusing to become a party, the cause of action on the equity side of the court cannot be sustained.

We come now to a consideration of the cause of action on the law side of the court.

The first question to be disposed of is whether or not the State is an indispensable party to this action.

In the case of Lowry *vs.* Thompson, 25 S. C., 416, Chief Justice McIver, speaking for the court in an exceedingly clear opinion, says: "It will be necessary, first, to dispose of the question of jurisdiction, for — it shall be determined that the court has no jurisdiction, then it would be not only unnecessary but improper to undertake to decide any of the other questions in the case.

57 That a State cannot be sued in any of its courts without its express consent is a proposition so universally conceded as to render any argument or authority to support it wholly unnecessary. If, however, authority should be asked for, it will be found in almost every case which will be hereinafter cited, where it will be found that the proposition has either been distinctly decided or expressly recognized, and we are not aware of any authority to the contrary.

As it is not pretended that any such consent was given in this case, the first inquiry is whether this is really an action against the State. The fact that the State is not named as a party to the record is not conclusive of this inquiry, though at one time it seems to have been so held in the case of Osborn *vs.* United States Bank, 9 Wheat., 738, followed by Davis *vs.* Gray, 16 Wall., 203; but these cases, so far as this particular point is concerned, are entirely inconsistent with the more recent decisions of the Supreme Court of the United States, where the rule seems to be now well settled that an action, though in form against an officer of a State, if it is in fact a suit against the State itself, cannot be maintained even though the State is not made a party on the record.

Louisiana *vs.* Jumel, 107 U. S., 711.

Cunningham *vs.* Macon & Brunswick R. R. Co., 109 *id.*, 440.

Hagood *vs.* Southern, 117 *id.*, 52.

* * * In Cunningham *vs.* Macon & Brunswick R. R. Co., *supra*, Mr. Justice Miller reviews this whole subject, and admits that it is not an easy matter to reconcile the various decisions of the
58 Supreme Court of the United States upon the subject, and, while disavowing any attempt to do so, he proceeds to deduce from them certain general principles. * * *

"1. It has been held in a class of cases where property of the State or property in which the State has an interest comes before the court and under its control in the regular course of judicial administration without being forcibly taken from the possession of the Government, the court will proceed to discharge its duty in regard to that property; and the State, if it chooses to come in as a plaintiff, as in prize cases, or to intervene in other cases when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court.

Of this class are the cases of The Siren, 7 Wall., 152, 157; The Davis, 10 *id.*, 15, 20, and Clark *vs.* Barnard, 108 U. S., 436. * * *

"2. Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property to which his defense is that he has acted under the orders of the Government.

In these cases he is not sued as or because he is the officer of the Government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officers.

To make out his defense he must show that his authority was sufficient in law to protect him. The somewhat famous case of United States *vs.* Lee, 106 U. S., 196, is cited as belonging
59 to this class, and to it we may add the subsequent case of Poindexter *vs.* Greenhaw, 114 U. S., 270.

"3. A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the Government a well-defined duty in regard to a specific matter, not affecting the general powers or functions of the Government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process."

The defendant is sued for damages growing out of alleged injuries to plaintiff's property, and the case falls within the rule laid down under the second head, *supra*, and therefore the State is not an indispensable party.

This conclusion is in harmony with the principles enunciated in the case of Pennoyer *vs.* McConnaught, 140 U. S., 1, in which the leading authorities on this subject are referred to.

Having reached the conclusion that the State is not an indispensable party in determining this cause of action, the next question for consideration is whether or not the contract between the State and the defendant relative to the 500 horse-power of water power is null and void.

This contract received legislative construction when it was ratified by the act of the legislature hereinbefore mentioned, and al-

though such construction is not binding on this court, still it shows the intention of the State when it reserved the 500 horse-power of water power.

60 We think the construction placed upon said contract in 1892 by the legislature as to the 500 horse-power reserved to the State was in harmony with the terms of said contract, the proviso to section 7 of the act of 1887 being that the right of the State to the free use of the said 500 horse-power should be absolute.

The use of the word "absolute" was for the purpose of creating a right in the State to this 500 horse-power separable and distinct from the ownership in other lands and not dependant upon any particular lands to which it may be appurtenant.

This reservation was a right of *profit à prendre.* Campell, C. J., in delivering the opinion of the court in Hall *vs.* City of Ionia *et al.*, 38 Mich., 423, says: "There is no foundation for the claim that a right to the perpetual use of water must be dependant upon a particular estate with which it is connected. Some confusion has, perhaps, been caused by an attempt among writers to create symmetry in the law by putting all rights connected with land or springing from them into classes, and by speaking of these particular rights as easements, which very commonly requires both a dominant & servient estate.

But every right of property must usually have some peculiar qualities of its own, which must not be destroyed by inappropriate attempts to classify it with different kinds. The old maxim *ommis definitio periculosa* is especially true when things of essentially different qualities are placed together under one head.

The value of water as a distinct inheritance, either for creating power or for other purposes of use or consumption, has been recognized in all periods, and its ownership is well established as

61 not dependent on lands to which it may be appurtenant, but as having a separate and intrinsic importance.

There may be an occasional dictum and possibly some decisions to the contrary; but most cases where any doubt seems raised on this question will be found to rest on peculiar facts which in no way involved the general doctrine. The facts are often such as to confine the use of water not only to special places, but also to specified purposes; but this limited use is the exception and not the rule," citing a *mu*nber of authorities. Proceeding, he says: "Experience has shown that in many instances the right to use and dispose of water may not only be more valuable than any land which is occup*u*ed for its gathering & disposal, but it is also of special value to be taken to a distance and parcelled out among several users or occupants. Water works are only made available by the sale of water to consumers, and valuable water power is frequently distributed among several mills in large & small quantities and may not be used by the owner at all.

The ownership of it cannot be confined to the right in the nature of a license, and is as well recognized a title or interest of a real nature as land itself, without some use of which it could not be made available."

Foster, J., in speaking for the court in Goodrich *vs.* Burbank, 12 Allen, 459, uses this language: "The water itself may not be the subject of property, but the right to take it and to have pipes laid in the soil of another for that purpose and to enter upon the land of another to lay, repair, and renew such pipes is an interest
62 in the realty assignable, descendible, and divisable." On this subject the language of Judge Curtis is as follows: "I know of no rule of the common law which prohibits grants of the incorporeal right to divert water from being made in gross. If I have a spring, I may sell the right to take water from it by pipes to one who does not own the land across which the pipes are to be carried, and I may either restrict the use to a particular house or not, as I please. It is true the grantee cannot make the grant useful without acquiring from the owner of the intermediate land the right to lay pipes therein, nor can he use the water in a house until he obtains the right to possess that house; but these may be acquired afterwards.

[Illegible.]

capable. Incorporeal rights may be inseparably annexed to a particular messuage or tract of land by the grant which creates them and makes them incapable of separate existence, but they may also be granted in gross, and afterwards, for purposes of enjoyment, be annexed to a messuage or land and again severed therefrom by a conveyance of the messuage or land without the right or a conveyance of the right without the lands."

Lonsdale Co. *vs.* Moies, 21 Law Rep., 664: * * * "We are unable to distinguish between the right to take water by a canal from a pond for the purposes of power and the right to take it from a spring in a pipe for domestic purposes, the watering of cattle, or to supply an artificial jet or fountain, and to sell it to any others for any uses they may desire to make of it."

The following authorities will also throw light upon the subject:

63 Tinicum Fishing Co. *vs.* Carter, 61 Penn. St., 39.
19 Am. & Eng. Enc. of Law, p. 259.
Gould on Waters, section 299, p. 562.
Poull *vs.* Mockley, 33 Wis., 482.
Washburn's Easements & Servitudes, section 12 & 17*a*.
Angell on Water-courses, section 143.

We are of opinion that the contract between the State and the defendant was not null and void.

It is contended that said contract did not confer upon the defendant the right to erect the steam plant. This depended upon the fact whether it was merely incidental to and essential to the enjoyment of the use of the water-power plant.

The parties to the action had the right of trial by jury as to the legal issues raised by the pleadings, but neither a demand was made therefor on circuit nor was there an exception raising such question.

This court must assume that the circuit judge properly decided

all questions of fact upon which his judgment had necessarily to rest.

Even if there was error on his part in his findings of fact, it is not the subject of review by this court in a law case.

This court, therefore, cannot review the testimony for the purpose of determining whether or not the steam plant was merely incidental to the water-power plant and essential to the enjoyment of its use.

64 For the same reason we cannot review his honor's finding of fact in effect that the plaintiff is owner in fee of the land described in the complaint, subject to the right of the State to the 500 horse-power of water power.

These views render it unnecessary to decide specifically the other exceptions herein.

It is the judgment of this court that, for the reasons herein set forth, the judgment of the circuit court be affirmed.

I concur in the result, as I am not satisfied that plaintiff ever acquired a title to the land upon which the works in question have been erected, for this does not depend solely upon the solution of a question of fact, as seems to be supposed.

HENRY McIVER, *C. J.*

I concur in the result.

Y. J. POPE, *A. J.*

[Endorsed:] 3517. South Carolina supreme court, Richland county. The Columbia Water Power Company, pl'ff, app'l't, *vs.* The Columbia Electric, &c., Company, def't, resp'd't. Opinion. Eugene B. Gary, A. J. I concur in the result, as I am not satisfied that plaintiff ever acquired a title to the land upon which the works in question have been erected, for this does not depend solely upon the solution of a question of fact, as seems to be supposed. Henry McIver, C. J. I concur in the result. Y. J. Pope, A. J. (Report.) Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed 18 Feb., 1895. U. R. Brooks, clerk.

65 Know all men by these presents that we, Charles K. Oliver and F. M. Rivers, are held and firmly bound unto the Co. lumbia Electric Street Railway, Light & Power Company in the full and just sum of ($500) five hundred dollars, to be paid to the said The Columbia Electric Street Railway, Light & Power Company, its certain attorney or assign; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of February, A. D. 1897.

Whereas lately, at a session of the supreme court of the State of South Carolina, in a suit depending in said court between The Columbia Water Power Company, plaintiff, appellant, and The Columbia Electric Street Railway, Light and Power Company, defendant, respondent, a judgment was rendered against the said The Columbia

Water Power Company, and the said The Columbia Water Power Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said The Columbia Electric Street Railway, Light & Power Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof: Now, the condition of the above obligation is such that if the said The Columbia Water Power Company shall prosecute said writ of error to effect and answer all costs if it shall fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES K. OLIVER. [SEAL.]
F. M. RIVERS. [SEAL.]

Signed, sealed, and delivered in presence of—
G. M. THOMPSON.

66 THE STATE OF SOUTH CAROLINA,
County of Richland.

Personally appeared before me G. M. Thompson and made oath that he saw the within-named Charles K. Oliver and F. M. Rivers sign, seal, and as their act and deed deliver the within-written bond.

G. M. THOMPSON.

Sworn to and subscribed before me this 9th day of February, A. D. 1897.

F. W. McMASTER,
Notary Public. [SEAL.]

THE STATE OF SOUTH CAROLINA,
County of Richland.

Personally appeared before me Charles K. Oliver and F. M. Rivers and severally swear each *and* of and for himself that he is worth the sum of five hundred dollars over all his debts and liabilities and exclusive of property exempt by law from execution.

CHARLES K. OLIVER.
F. M. RIVERS.

Sworn to and subscribed before me this 9th day of February, A. D. 1897.

F. W. McMASTER,
Notary Public. [SEAL.]

Approved:
HENRY McIVER,
Chief Justice of the Supreme Court of the State of South Carolina.

February 9th, 1897.

67 UNITED STATES OF AMERICA, *ss:*

To the Columbia Electric Street Railway, Light and Power Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of South Carolina, wherein The Columbia Water Power Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry McIver, chief justice of the supreme court of the State of South Carolina, this ninth day of February, in the year of our Lord one thousand eight hundred and ninety-seven.

HENRY McIVER,
Chief Justice of the Supreme Court of the State of South Carolina.

68 [Endorsed:] The Columbia Water Power Company, plaintiff in error, against The Columbia Electric Street Railway, Light and Power Company, defendant in error. Citation in error. Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed 9 Feb., 1897, with copy. U. R. Brooks, clerk.

Service of the within citation acknowledged February 9, 1897.
WM. H. LYLES,
Def't's Att'y.

69 THE COLUMBIA WATER POWER COMPANY, Plaintiff in Error,
against
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, Defendant in Error.

The plaintiff in this action makes the following assignment of errors which it avers occurred in the judgment of the supreme court of the State of South Carolina herein February 18, 1895:

That error was committed in deciding in favor of the validity of the contract between the defendant and the board of directors of the South Carolina penitentiary May 26, 1892, and the act of the General Assembly of the State of South Carolina December 24, 1892, ratifying and confirming the same, which were drawn in question on the ground of their being repugnant to the Constitution of the United States of America, in this, that they impaired the obligation of the contract made by the State of South Carolina Decem-
70 ber 24, 1897, as to the rights, franchises, and privileges of plaintiff as owner in fee of the property known as the Columbia canal, and more especially as to the plaintiff's sole and ex-

clusive right, franchise, and privilege to *see* and lease the water power developed by said canal, and as to the five hundred horse-power of water power to be furnished to *to* the said State, and in this, that they deprived the plaintiff of its property without due process of law.

And the plaintiff prays that the said judgment be reversed and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of said judgment.

LE ROY F. YOUMANS,
Att'y for Pl'f in Error.

February 9, 1897.

71 [Endorsed:] The Columbia Water Power Company, pl't'f in error, *v.* The Col'a Electric Street R'lway, Light and Power Co., d'f't in error. Assignment of errors and prayer for reversal. Le Roy F. Youmans, att'y for p'ff in error. Supreme court of South Carolina, clerk's office, Columbia, S. C. Filed 9 Feb., 1897. U. R. Brooks, clerk.

72 THE STATE OF SOUTH CAROLINA, }
Supreme Court. }

I, U. R. Brooks, clerk of the supreme court of the State of South Carolina, do hereby certify that annexed to and returned with this writ of error in the case of The Columbia Water Power Company, plaintiff in error, against The Columbia Electric Street Railway, Light and Power Company, defendant in error, are the foregoing transcript of the record in the said case on file in the said court, which I hereby certify to be a true copy of said record; also the assignment of errors and prayer for reversal and citation to the defendant in error, with acknowledgment of service.

Witness my hand and the seal of the supreme court of the State of South Carolina, at Columbia, this fifth day of March, A. D. 1897.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of Supreme Court of S. C.

73 [Endorsed:] The Columbia Water Power Company, plaintiff in error, *v.* The Columbia Electric Street Railway, Light and Power Company, defendant in error. Writ of error, transcript of record, citation in error, assignment of errors and prayer for reversal, and certificate.

Endorsed on cover: Case No. 16,508. South Carolina supreme court. Term No., 729. The Columbia Water Power Company, plaintiff in error, *vs.* The Columbia Electric Street Railway, Light and Power Company. Filed March 8th, 1897.

Brief of Youmans for P. in E.

Filed May 10, 1897.

ARGUMENT CONTRA.

MOTIONS TO DISMISS AND TO AFFIRM.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

No. 317

THE COLUMBIA WATER POWER COMPANY, PLAINTIFF IN ERROR,

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, DEFENDANT IN ERROR.

LEROY F. YOUMANS,
FOR PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

No. 729.

THE COLUMBIA WATER POWER COMPANY, PLAINTIFF IN ERROR,

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, DEFENDANT IN ERROR.

The defendant moves this Court to dismiss the writ of error herein to the Supreme Court of the State of South Carolina, issued on the allowance of the Chief Justice of the Court last named, for want of jurisdiction, because, as it claims, none of the Federal questions raised in the State trial or Supreme Court were involved in the judgment and decision brought up here for review.

The defendant also moves this Court to affirm said judgment, because, conceding that the record shows that this Court has jurisdiction, and that all these Federal questions were involved in that judgment, and were decided adversely to the claims set up by the plaintiff, yet they were all so frivolous as not to need further argument, and it is manifest that the writ was taken for delay only.

I.

In considering what, germane to this discussion, was decided by the State Court, it should be premised that, under the law and practice then existing, the Supreme Court of the State of South Carolina consisted of three Judges, a Chief Justice and two Associate Justices (So. Ca. Cons. 1868, Art. 4, §§ 2 and 9), and the decree of a Circuit Judge, including what was said in the opinion, was, in any given case in which the decree was made, *res judicata*, and the law of that case until its reversal by two of the Judges of the State Supreme Court. So. Ca. Cons. 1868, Art. 4, § 12; Code, § 14; 2 Rev. St. So. Ca. 1893, page 9.

In this case, the only portion of the Circuit decree as to which there was concurrence, either in affirmance or reversal, by two of the Judges of the State Supreme Court, was the result, to wit: the affirmance of the *judgment* of the Circuit Court, "that the complaint be dismissed."

As the Circuit decree, Hudson, J., was pronounced *oretenus*, immediately at the close of the argument, and was taken down from his lips, the seven portions of that decree to which attention is called are purposely not presented in the textual order in which they appear in the decree, to wit:

1. The plaintiff acquired its rights under the act of 1887, which was a contract between the State and the plaintiff; and claims that those rights have been affected and violated by the contract made between the defendant and the State, to wit: the contract made by defendant with the Board of Directors of the State Penitentiary, 1892, approved and ratified by the State 1892, which said contract this Court has jurisdiction to construe.

2. This last mentioned contract and act have given to defendant all of the rights which the State had in the five hundred horse power of water power under the contract between the State and the plaintiff, made by the act of 1887.

3. That right of the State to the five hundred horse power of water power is absolute, and the State can dispose of it in any way she chooses.

4. Under the act of 1892, the defendant, as lessee of the State, has the *unquestionable* right to put the electric plant on the banks of the *[Columbia] Canal, and to carry out the contract which has been made between it and the State.

5. Under the act of 1892, defendant has the *supplementary* right to put in and erect a steam plant on the banks of the canal. [Nos. 4 and 5 are in the decree, notwithstanding earlier in it is No. 6.]

6. The State conveyed the canal property to the plaintiff, and thereby conveyed in fee all of the property known as the "canal property," *including its banks*, as it existed at the time of the conveyance.

At the time of the passage of the act of 1887, and of the conveyance made thereunder, the canal property covered the land upon which the defendant's works have been since erected.

7. I hold that there has been no violation of the State's contract with the plaintiff.

Despite the assumptions *contra* in defendant's Brief, page 19, this decree does pass on the act of 1892—is not based solely on the act of 1887. What is held about it is not a mere incidental mention of the act of 1892, is not a mere indication that the Court did not consider that it had any effect upon the rights which the plaintiff had.

On the contrary, the decree is a most unequivocal decision, *inter alia*, that all of the actings and doings of defendant complained of by plaintiff in the pleadings were authorized and justified by the act of the Legislature of 1892, and the contract with defendant which that act approved and ratified, that the contract and the act of 1892 did not impair the obligation of the contract made by the State with the plaintiff by the act of 1887, and that the contract and act of 1892 and the said actings and doings of defendant were none of them violations of the contractual rights of plaintiff acquired under the act of 1887, or deprivations of plaintiff of its property without due process of law.

The decree *ab ovo usquead mala* is

1. A construction of the act of 1887, which it holds was a contract made by the State with the plaintiff, and of the rights of the contracting parties thereunder.

2. A construction of the contract of 1892, made with the defendant, and of the act of 1892, approving and ratifying the same, and of the rights of the contracting parties thereunder.

3. A decision that the obligation of the contract of the act of 1887 was in no manner impaired by the later contract with defendant and the later act of 1892, which it held did not deprive plaintiff of its property

*In the decree the words are, "the canal of the penitentiary," but the Columbia Canal, the plaintiff's canal, is the only one in the case or in the vicinity.

without due process of law. *It is, in truth, law, and fact, the decision of Federal questions and nothing else.*

Take these from it and there will not be left even what Sir Walter Scott thought would be left of "the play of Hamlet with the part of the Royal Dane omitted"—not only no substance, but no shell.

It will not avail defendant to escape from this—to say that this is merely the decision of the Circuit Court, and not of the State Supreme Court. None of these seven portions of this decree, adjudications, holdings, findings ("Call them what you will," to use the Circuit Judge's words), were overruled by the State Supreme Court or any of them even questioned, save one by one member of that Court, though both plaintiff and defendant carried up in proper form, by exceptions, such portions of the Circuit decree as they deemed to be error, impinging on their rights. For plaintiff's exceptions, see Record, pp. 23-25, fols. 43-47.

The entire decree of the Circuit Judge is the decision and judgment of the State Court; the dismissal of the complaint with which the Circuit decree concludes being *expressly* affirmed, and all the rest of the decree being affirmed by non-reversal.

Before taking up the several actions of the three State Supreme Court Judges, attention is called to these adjudications of this Court:

"It has never been held that the record of the proceedings of the highest Court must state in terms a misconstruction by that Court of the act of Congress. It is enough that it is an inference of law from the inspection of the whole record, that the highest Court did thus misconstrue an act of Congress, and annul a right or title, otherwise valid by reason of said misconstruction. Any other rule confining this Court to an inspection of that part of the record which sets out the proceedings of the highest Court alone, would be a departure from the general principle, that the whole of the instrument is to be looked at to determine the effect of each part of it, and would present for decision an artificial and not a real case; and inasmuch as the highest State Court often simply reverses or affirms the judgment below, would, in all such cases, deprive the citizen of the rights secured to him by the Constitution, and § 25 of the Judiciary Act. And it has been the practice of this Court, whenever necessary, to look at the proceedings of the inferior State Court in connection with the proceedings of the highest Court, in order to deduce therefrom the points decided by the latter. Now, the bill of exceptions taken in this case in the Circuit Court shows that the construction of the act of Congress was in question in that Court, was misconstrued there, and a deed under which the plaintiff in error deduced title, was declared to be void by reason of such misconstruction."

Neilson v. *Lagow*, 12 How., 109.

The same principle applies where there is alleged error in the construction of the statute by which a contract was made by the State with plaintiff, and in the construction of subsequent State legislation, by which he claims the obligation of his contract was impaired.

"A right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes, as if it had been *specifically* re-

ferred to and the right directly refused." *Chapman* v. *Goodnow*, 123 U. S., 548.

"Whenever the highest Court of a State, by *any form of decision*, affirms or denies the validity of a judgment of an inferior Court, over which it can by law exercise appellate authority, the jurisdiction of this Court to review such decision, if it involve a Federal question, will, upon a proper proceeding, attach. It cannot make any difference whether, after an examination of the record of the Court below, such decision be expressed by refusing a writ of error or *supersedeas*, or by dismissing a writ previously allowed. And when this Court has once acquired jurisdiction, it may send its process, in the enforcement of its judgment, to the appellate Court of the State or to the inferior Court whose judgment is reversed." *Williams* v. *Bruffy*, 102 U. S., 356. And this Court awarded final judgment here, reversing the judgment of the State *Circuit Court*, and awarding judgment to plaintiff for what it held to be due him.

Where a controlling Federal question stands in the very front of the litigation, to give a judgment the other way, without considering it, is simply to ignore one of the most important elements in the case, and this Court has jurisdiction.

DesMoines Nav. Co. v. *Iowa Homestead Co.*, 123 U. S., 555.

Attention is called, also, to § 8, art. 4, of the Constitution of 1868 of the State, then in force: "When a judgment or decree is reversed or affirmed by the Supreme Court, every point made and distinctly stated in writing in the cause, and fairly arising upon the record of the case, shall be considered and decided, and the reasons therefor shall be concisely and briefly stated in writing, and preserved with the records of the case."

As already shown, the decision and judgment of the Circuit Court in this case are *ex necessitate rei* the decision and judgment of the State Supreme Court, and a minute consideration of so much of the opinions of the three several Judges of the State Supreme Court as treats of the Federal questions would only support this conclusion as to those questions.

Gary, A. J., states:

1. The acts of the Legislature and conveyances vesting title in plaintiff to the Columbia Canal, together with the lands held therewith, including the strip of land on which the electric and supplementary steam plant of defendant have been erected since the conveyance to plaintiff, January 11, 1892 (*Record, 5, fol. 11*), the contract of defendant, May 26, 1892, and the act of the Legislature, December 24, 1892, under which alone defendant claims. *Record, 27, fols. 50, 51.*

2. That *one* of the objects of plaintiff's action is to have declared null and void the contract between the State and the defendant as to the five hundred horse power of water power, on the ground that the State could not lease the same. *Record, 29, fol. 54.*

3. That a question for consideration is, whether or not the contract between the State and the defendant relative to the five hundred horse power of water power is null and void—that *this* contract received legislative construction when it was ratified by the act of the Legislature, December 24, 1892, which legislative construction placed upon said contract in *1892* shows the intention of the State, when it reserved the five hundred horse power of water power in *1887!* is in harmony with the terms of *said* contract [*it only approved and ratified*] that the use of the word absolute (§ 7, act of 1887,) was for the purpose of cre-

ating a right in the State to this five hundred horse power, separable and distinct from ownership in other lands, and not dependent upon any particular lands to which it may be appurtenant. The reservation of the five hundred horse power of water power being a right of *profit a prendre*. *Record, 31, 32, fols. 59, 60; defendant's Brief, 15, 16.*

4. That the contract between the State and the defendant, contract and act of 1892, is not null and void. *Record, 33, fol. 63.*

5. Declines to consider plaintiff's contention that the contract and act of 1892 could not, and did not, confer upon defendant the supplementary right to erect a steam plant on the banks of the plaintiff's canal, or to review the Circuit Judge's decision that it did confer such right. *Record, 33, 34, fol. 63.* In support of plaintiff's contention, see *Plaisted et al.* v. *Inhabitants of Lincoln*, 62 Maine, 917.

6. The views taken by him render it unnecessary to decide specifically the other exceptions of plaintiff. *Record, 34, fol. 64.*

McIver, C. J. "I concur in the result, as I am not satisfied that plaintiff ever acquired a title to the land upon which the works in question have been erected, for this does not depend solely upon the solution of a question of fact, as seems to be supposed." *Record, 34, fol. 64. This land is the bank of plaintiff's canal.* In so far as matter of fact is concerned, see Circuit decision, which controls. *Record, p. 20, fol. 38; defendant's Brief, 13, 14; opinion of Gary, A. J.; Record, p. 27, fol. 50.* In so far as matter of law is concerned, see *Bishop* v. *Seeley, 18 Conn., 393.* "*Canal* is unlike the words river, pond, lake, and other words used to designate natural bodies of water, the ordinary meaning of which is confined to the water itself, but *the word canal includes also the banks.*"

Y. J. Pope, A. J. "I concur in the result." *Record, 34, fol. 64.*

Reading the opinions of the three State Supreme Court Judges alone, or as they should be read in connection with the Circuit decree and exceptions thereto by plaintiff, taken on appeal to the State Supreme Court, and the pleadings, and it is patent:

1. That the defendant's contract of 1892 and the act of 1892 and the act of 1887, plaintiff's contract with the State are all construed.

2. That the obligation of plaintiff's contract with the State is decided to be not impaired by the subsequent contract and act, which, therefore, are, *as construed*, decided to be in full force and virtue.

3. That this subsequent legislation, and the defendant's actings and doings thereunder, and in which they find their sole justification, it is decided do not deprive plaintiff of its property without due process of law.

If this last is not *specifically* decided, it is *generally* decided; and even the evasion of its decision would not prevent the jurisdiction of this Court attaching.

But assuming, for the sake of argument, and for that purpose only, the correctness of the assumption in *defendant's Brief, page 19*, "that the Supreme Court of South Carolina did not pass upon the act of 1892, but based its decision solely upon the act of 1887," still as "the State Court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this Court may inquire whether the supposed contract did give the right; because, if it did, the subsequent law cannot be upheld." The exact point decided not only *tolidem but ipsissimis verbis, in N. O. Water Works* v. *La. Sugar Co., 125 U. S., 38*, last sentence on the page.

"The established rule is, that where the judgment of the highest Court of the State, by its terms or *necessary operation*, gives effect to

some provision of the State law, which is claimed by the unsuccessful party to impair the contract set out, and relied on, this Court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the State law complained of impairs its obligation * * * The legal existence of the contract itself, and *its proper construction* are necessarily involved in the question of the alleged impairment thereof." *Mobile & Ohio R. R. Co.* v. *Tennessee*, 153 U. S., 493, supported by a wealth of authority cited.

Where it is claimed that a subsequent statute passed by a State has impaired the obligation of the contract, as claimed by the plaintiff in error, and *where such subsequent statute has, by the judgment of the State Court, in some way been brought into play, and effect been given to some or all of its provisions;* in such a case *this* Court construes the contract, in order to determine whether the latter statute impairs its obligation. *Bacon* v. *Texas, 163 U. S., 219; Louisville Gas Co.* v. *Citizens' Gas Co., 115 U. S., 683, 697.*

"Where a statute of a State creates a contract, and a subsequent statute is alleged to impair the obligation of that contract, and the highest court of law or equity in the State *construes* the *first* statute in such a manner as that the second statute does *not* impair it, whereby the second statute remains valid under the Constitution of the United States, the validity of the second statute is drawn 'in question,' within the meaning of the 25th section of the Judiciary Act of 1789." Italics in the syllabus. *The Bridge Proprietors* v. *The Hoboken Co., 1 Wallace, 116, 144.* This is the case at bar, or stated more particularly as to one *especial* point in this case thus: "If that act and the proceedings under it amounted to a contract, and that contract prohibited the kind of structure which the defendants were about to erect under the act of 1860, then the latter act must be void, as impairing that contract." *1 Wallace, 145. Mutatis mutandis,* this would read thus: "If the acts and proceedings and conveyances under them relied on by plaintiff amounted to a contract, and that contract vested title in the plaintiff to the canal and its banks, and prohibited expressly or impliedly—*Stewart* v. *Police Jury, 116 U. S., 134*—the erection of the structures by defendant on the banks of plaintiff's canal, alleged in paragraphs 12 and 13 of the complaint, to wit: the electric plant on the Southern side, and the supplementary steam plant on the Northern side of defendant's power house, the right to do which is, according to the construction placed by the State Supreme Court upon the contract and act of 1892, given thereby to the defendant, then the said latter contract and act must be void, as impairing the obligation of plaintiff's contract."

Whether there was the contract claimed by plaintiff in error, and, if so, what its effect was, and whether the subsequent statute has impaired the obligation of that contract, are questions of which this Court always has jurisdiction. *University* v. *the People, 99 U. S., 321.*

"In far the larger number of cases brought to this Court, under the clause of the Federal Constitution declaring that no State shall pass any law impairing the obligation of a contract, the question has been as to the existence and *nature* of the contract, and not the construction of the law which is supposed to impair it; and the greatest trouble we have had on this point has been in regard to what may be called legislative contracts—contracts found in statute laws of the State, if they existed at all. It has become the established law of this Court that a legislative enactment, in the ordinary form of a statute, may contain provisions which, when accepted as the basis of action, by individuals

or corporations, become contracts between them and the State within the protection of the clause referred to of the Federal Constitution." *New Jersey* v. *Yard, 95 U. S., 113, 114.*

"In determining whether a statute of a State impaired the obligation of a contract, *this* Court must decide for *itself* the existence and *effect* of the original contract, as well as whether its obligation has been impaired. *Vicksburg &c. R. R. Co.* v. *Dennis, 116 U. S., 667; Louisville and Nashville R. R. Co.* v. *Palmes, 109 U. S., 256, 257.*

The contract with defendant, May 24, 1892, being an agreement made by the Board of Directors of the South Carolina Penitentiary, the agents of the State by its authority, is an enactment to which the State gave the force of law by the act of December 24, 1892, and is a statute within the meaning of Rev. Stat., § 709, relating to the jurisdiction of this Court—so expressly decided. *Wright* v. *Nagle*, 101 U. S., 793; *N. O. Water Works* v. *La. Sugar Co.*, 125 U. S., 31; *Williams* v. *Bruffy*, 96 U. S., 183; *Jefferson Brch. Bk.* v. *Skelly*, 1 Black, 443, last sentence on page; *Mobile Railway Co.* v. *Nebraska*, 146 U. S., 446, 447.

"The only question involved in this case proper for us to consider is whether the act of the Legislature of Wisconsin, August 8, 1848, reserving to the State the water power created by the erection of the dam over the Fox River, *as construed by the Supreme Court of that State, and the proceedings thereunder*, operated to deprive plaintiffs in error of their property without due process of law."

"Notwithstanding the inhibition of the Constitution is not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the Court, it is evident that the Court could not have reached a conclusion adverse to the defendant company without holding either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law. This Court has had frequent occasion to hold that it is not always necessary that the Federal question should appear *affirmatively on the record or in the opinion*, if an adjudication of such question were necessarily involved in the disposition of the cause by the State Court?" *Kankanna Co.* v. *Green Bay and Miss. Canal*, 142 U. S., 269. Citing *Willson* v. *Blackbird Marsh Creek Co.*, 2 Peters, 245; *Armstrong* v. *Treasurer of Athens Co.*, 16 Peters, 285; *Chicago L. Ins. Co.* v. *Needles*, 113 U. S., 574; *Eureka Lake Co.* v. *Yuba County*, 116 U. S., 410. All of which cases are full to the point.

In this case there is involved not only the question of the wrongful diversion of the five hundred horse power of water power, under color of the contract and act of 1892, in violation of plaintiff's contract, but also the decision, adverse to him, of the right of defendant to take, under their color, plaintiff's property without due process of law, as set out in 12th and 13th paragraphs of the complaint. See the allegations 142 U. S., 270, and 16 Pet., 246, 247, and contrast with the allegations of the complaint in the case at bar. In *Roby* v. *Colehoun*, 146 U. S., 159, though it did not appear from the opinion of the Court of original jurisdiction, or of the State Supreme Court, that either Court formally passed upon a Federal question, the necessary effect of the decree was to determine adversely to Roby the rights and immunities claimed by him, and the necessary effect, in law, of the judgment has been to deny those rights and immunities, and the motion to dismiss was overruled.

Where the question is presented of the violation of the Constitution

of the United States by an act of the State Legislature, and in what regard, no specific mention of the specific provision of the Constitution is necessary in order to entitle the party to a decision of the question by any court having jurisdiction to determine it, and the adverse judgment of the highest State Court necessarily involves a decision against a right claimed under the Constitution of the United States.

Spencer v. *Merchant*, 125 U. S., 352.

It has never been held that the clause of the Constitution supposed to be infringed by the State law ought to be pointed out in express terms; but the true and rational rule is, that the Court must be able to see clearly from the whole record that a certain portion of the Constitution was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied. *Proprietyrs of Bridge Co.* v. *Hoboken*, 1 Wallace, 143; *Furman* v. *Nichol*, 8 Wall, 56; *Murray* v. *Charleston*, 96 U. S., 442; *Murdock* v. *City of Memphis*, 20 Wall, 628.

The construction put by the State Supreme Court upon the contract and act of 1892 is, for the purposes of this case, to be taken by this Court as much a part of the said contract and act as if textually inserted therein. *Chicago, St. Paul & Milwaukee R. R. Co.* v. *Minnesota*, 146 U. S., 366; *La.* v. *Pillsbury*, 105 U. S., 291; *Leffingwell* v. *Wanen*, 2 Black, 603.

Not necessary that the State Supreme Court should, in terms, have passed upon the question of the repugnancy of the contract and act of 1892 to the Constitution of the United States. *Chicago Life Ins. Co.* v. *Needles*, 113 U. S., 579.

It suffices if the judgment of the State Supreme Court, by its necessary operation, gives effect to some legislative enactment of the State, which is claimed by the unsuccessful party, the plaintiff in error, to impair the obligation of the contract with him. *Lehigh Water Co.* v. *Easton*, 121 U. S., 392, last sentence.

The Federal question held by this Court to have been decided, or, what was tantamount thereto for the purposes of the jurisdiction of this Court, evaded by a State Supreme Court, the opinion of the State Supreme Court to the contrary *non obstante*. *Des Moines Nav. Co.* v. *Iowa Homestead Co.*, 123 U. S., 554, 555.

That this Court has jurisdiction in the case at bar is plain, because made plain by the repeated decisions of this Court.

II.

There being no color of right to dismissal, the specific ground of want of jurisdiction, upon which it is made, having been overruled *toties quoties*, as it has been made in this Court, and uniformly decided against, the motion to affirm the judgment will not be entertained. In *Davies* v. *Corbin*, 113 U. S. 689, this Court says: "In *Whitney* v. *Cook*, 99 U. S., 607, it was ruled that the motion to affirm could not be entertained, unless there appeared on the record at least some color of right to a dismissal. This practice has been steadily adhered to ever since, and in our opinion prevents our entertaining the motion to affirm."

The same decision for the same reason was made in *Gaines* v. *Corbin*, 113 U. S., 689. The ground that the writ of error was sued out for delay only, is clearly totally untenable in every aspect. Plaintiff is not delaying defendant in any sense. Plaintiff owes defendant neither money nor duty of any sort. Defendant is enjoying the avails arising from leasing and selling water power to which plaintiff claims that it has *de jure* the exclusive right, and the proceeds of what plaintiff claims to be

the illegal entry and trespasses by defendant upon plaintiff's realty, and the illegal erection of buildings, electric plants and supplementary steam plants by it upon the banks of plaintiff's canal, and it is in possession of plaintiff's land, all of which the State Court has held is justified by the contract and act of 1892. All that plaintiff asks is a hearing of his plaint that this judgment be reversed because its contract rights have been violated, and its property taken and given to defendant without due process of law, by statutes which contravene the provisions of the Federal Constitution. Defendant sits, plaintiff contends, in the unlawful enjoyment of plaintiff's property, *sedet at que æternum sedebit*, unless plaintiff can dislodge it from its prey by the aid of this, the highest judicial tribunal in the land.

As to the ground that the questions on which the jurisdiction depends are so frivolous as not to need argument. To show that they are so, even if the Court could entertain it, which under its decisions quoted and uniform practice it will not do, has an equally void foundation. This is manifest from the action of the Circuit and Supreme Courts; but how totally destitute of substance is this ground of the motion to affirm the judgment can only be fully understood by reading the complaint and answer, to which this Court is respectfully referred.

The scope of only the most salient features of the Federal questions involved in the contention will be here adverted to.

Plaintiff contends that by the act of 1887, and the act of 1890 amendatory thereof, and the conveyances thereunder, it became seized in fee on January 11, 1892, of certain realty, including notably the Columbia Canal and its banks, and certain rights, franchises, privileges, and properties, notably an essential one, the essential one, that which induced the purchase, and without which there would have been no inducement whatever to make such an investment, the exclusive right, franchise, privilege to "sell or lease the water power of the canal, subject to such rules and regulations as plaintiff should prescribe." § 21, Act 1887; 19 St. So. Ca., 10, 96; § 2, Act 1890; 20 St. So. Ca., 698.

The only limitation which is claimed to exist to this exclusive franchise and property, in so far as this case and defendant are concerned, is the obligation in § 7 of the act of 1887 to "furnish to the State, free of charge, on the line of the canal, 500 horse power of water power. * * * *Provided*, That the right of the State to the free use of the said 500 horse power shall be absolute, and any mortgage, assignment or other transfer of the said canal shall always be subject to this right. Immediately after the grant of this exclusive franchise, the same section—§ 21, act of 1887—says this 500 horse power of water is to be provided for the State at the penitentiary; § 2 of the same act provides that it is for the use of the penitentiary. Plaintiff contends that the proviso in § 7, when construed in connection with the other sections of the act (with or without the other acts *in pari materia*, which, on the rule laid down by Lord Mansfield in *The Earl of Ailesbury* v. *Pattison*, 1 Douglass, 30, should be taken together), can only mean that the State shall have the right to use this power free of charge at the penitentiary, for the use of the penitentiary, for all time, and no mortgage, assignment or transfer can destroy the right so to use it. The whole of the act must be read together; and if so, the right to the free use of it must be exercised in the manner prescribed by it. It must also be remembered that the act itself authorized a mortgage of the entire property, and it was to save and protect this right to free use—*i. e.*, without pay—against mortgages and conveyances, that the word absolute was used. Defendant

and the Board of Directors, May 26, 1892, entered into the contract about this 500 horse power of water power, which was approved and ratified by the Legislature, December 24, 1892.

Nota Bene. ☞That throughout this contract this five hundred horse power of water power is always spoken of as reserved by the State of South Carolina "*for the use of the South Carolina Penitentiary.*"

What was meant by "*for the use of the penitentiary*" had long been fixed by statute act September 21, 1866, "water power to be made available for manufacturing purposes within the penitentiary enclosure" by convict labor. Plaintiff's views, perhaps too liberal and enlarged, of what uses the five hundred horse power of water power could be put to, are set out in paragraph 10 of the complaint. Defendant's continued illegal leasing and selling and misappropriation of this horse power of water for its private gain, is set out in paragraph 11 of the complaint.

Plaintiff contends that the State, by the terms of the contract, is entitled to the five hundred horse power of water power only *qua* State for the use of the penitentiary; can use it at most only for public purposes, and most assuredly cannot sell or lease it to private parties for private purposes, and enable them to compete with plaintiff in the selling and leasing of water power, of which franchise and privilege it should *de jure et ex contractu* be in the exclusive enjoyment.

Sec. 11 of the complaint shows how, by adjustment between the parties, a manner was adopted by which the five hundred horse power of water power was furnished to the State, defendant, as agent of the State, obtaining all that it claimed in the way of erection of plant and works on plaintiff's land; and secs. 12 and 13 of the complaint show the high-handed trespasses on and taking of other lands of plaintiff, and the unauthorized erection of electric and supplementary plants on the banks of plaintiff's canal, to the great danger to the safety of the canal, and great damage to the embankment. Sec. 16 of the complaint sets out the relief to which plaintiff conceives itself entitled by injunction and compensation.

The answer of defendant denies that the banks of the plaintiff's canal are plaintiff's property. This question of title has been decided in plaintiff's favor, as already shown, and, as matter of law, is utterly untenable, as already shown.

Defendant's answer further sets up the act of 1887 as showing that plaintiff had not the exclusive franchise claimed, and that the State had the right to dispose of the 500 horse power of water power in any way she chose.

The allegations of §§ 12 and 13 of the complaint, as to the trespasses on plaintiff's land and the buildings forcibly and illegally erected, against plaintiff's protestations, on the banks of plaintiff's canal, are answered thus in paragraph IV. of the answer: "Defendant denies that it ever intended to injure the plaintiff in its franchises, privileges, and property by the erection and maintenance of the engine, boilers, and other machinery referred to in the 12th and 13th paragraphs of the complaint, *and denies that said engine, boilers, and other machinery are located upon any land in which the said plaintiff has any interest whatever.* On the contrary, it alleges that said engine, boilers, and machinery were erected for the purpose of maintaining the power which the works so erected were calculated to develop from the use of the water power alleged in said complaint, in case the said canal should be inadequate, on account of high water or any defect in said canal to furnish the power required of it."

As to which it need only be said, that it is decided in this case that

plaintiff had fee simple title to the land on which defendant's erections were made, and that said decision was affirmed by the State Supreme Court, on defendant's carrying up the point by exception (*Record, page 28, fol. 42, exception 2*); and all apprehension of loss from the casualty referred to in the latter portion of paragraph IV. of the answer, while it would, in no event, afford any justification or excuse for defendant's unwarranted entry, or forcible seizure of, and illegal erections of buildings on the banks of plaintiff's canal, to the damage and danger of the safety thereof, had been carefully guarded against in defendant's contract with the Board of Directors of the penitentiary. *Record, p. 18, fol. 34.* This clause is omitted from the contract as it appears in *defendant's Brief, page 9*, and occurs in the space on that page of its Brief covered by asterisks.

The answer then sets up the contract with Board of Directors of the South Carolina Penitentiary, May 26, 1892, and the act of the Legislature approving and ratifying the same. It is proper to add that, according to the law and practice in South Carolina, all the allegations of the plaintiff's complaint not denied by the answer of the defendant are admitted (So. Ca. Code, §§ 170, 189; 2 Rev. St. So. Ca., 1893, pages 76, 85; *Addison* v. *Duncan*, 35 So. Ca., 173); and, also, that where the answer of defendant does not set up a counter-claim, the plaintiff is not allowed to reply, save on defendant's motion; but the new matter alleged in the answer is deemed controverted by the plaintiff as upon a direct denial or avoidance. So. Ca. Code, §§ 174, 189; 2 Rev. St. So. Ca. 1893, pp. 79, 85.

The controversion made by plaintiff of the contract and act of 1892 was on the ground of their impairment of the obligation of plaintiff's contract, in violation of the Federal Constitution, art. I, § 10, and depriving plaintiff of its property without due process of law, in violation of art. XIV., Cons. U. S.

The real contest as to law points was as to the construction of the acts, and as to whether the contract and act of 1892 impaired the obligation of plaintiff's contract and divested it of its property. I quote *verbatim* the opening sentence of this branch of the argument by one of defendant's counsel before the Supreme Court: "Plaintiffs allege a prior contract with them, and that the act of 1892 violates that contract; and therefore they say our contract is null and void, and will be disregarded." The idea that the Federal questions involved and decided are frivolous is generated by the aversion to their being brought before this Court for review. The Federal questions decided against plaintiff are not frivolous under any definition of the word ever given. See them collected, 2 Till & Sherman's Practice, 191; Wait's N. Y. Annotated Code, 439, note 1; *Cottrell* v. *Cramer*, 40 Wisc., 558, 559.

e. g., Is it frivolous to ask this Court, having jurisdiction, to determine whether defendant has a right to do what is alleged (and not denied) in 12th and 13th paragraphs of the complaint? Is it frivolous to ask this Court to determine whether the State, by the contract and act of 1892, the sole claim of defendant, can confer upon defendant this right? Is it frivolous to ask this Court to determine whether a decision that the act and contract of 1892 did confer upon defendant such right is justified by this logic?

Quotation from Circuit decree which, by non-reversal, is affirmed by State Supreme Court: "Now, has the defendant the *supplementary* right to put in a steam plant? Prudence and foresight justifies its erection on the banks of a *canal* along a river where freshets come; and

where time is important, there might be serious interruption to the industries of the defendant company, and thus of the penitentiary; *therefore*, the defendant has a right to use so much steam plant as is necessary to supplement its water power, at such times as the water power is unavailable by reason of freshets, or necessary repairs to the canal, or other causes. The dam may break, rains may swell the river, and there might be a long interruption to the use of the water power, and it would be necessary to resort to the steam plant to carry on the work. It is common to use steam as an adjunct to water power plants. The defendant cannot erect any more steam plant than is necessary for it to use as a supplement to the water power which it has received from the State. I therefore hold that there has been no violation of the State's contract with the plaintiff." Record, p. 21, fol. 40; defendant's Brief, p. 15.

However admirable this logic may be to show the wisdom of defendant's erecting a steam plant on the banks of *its* own canal, we fail to see how any construction of defendant's contract and the act of 1892 can confer upon defendant the legal right to erect that steam plant on the banks of plaintiff's canal without interfering with the obligation of plaintiff's contract with the State, and without depriving plaintiff of its property without due process of law.

Besides, in addition to the gravity and importance of the Federal questions arising from defendant's trespasses upon plaintiff's land, and the forcible seizure of and depriving plaintiff thereof, *et alia enormia*, set out in paragraphs 12 and 13 of the complaint, admitted by non-denial, justified only by the defendant's contract of 1892, and the act of 1892, approving and ratifying the same, as they are construed by the State Court, there is the grave and important question of depriving plaintiff of its exclusive right and franchise to sell and lease the water power developed by the canal, the controlling inducement and sole enticing lure held out to plaintiff to purchase the canal, lands, rights, privileges, and properties held therewith, which has only the same justification. Is it a frivolous contention that, under a fair construction of the contract with plaintiff, made by the State, the State was to be furnished by the plaintiff with five hundred horse power of water power, at the penitentiary, for the use of the penitentiary, that use settled and defined by previous legislation, and to be used for no other purpose, and to be put to no other uses?—certainly not to uses and purposes beyond those of the State, *qua State*, in its public institutions, where the same was needful for supplying public wants and requirements—and, least of all, to a rival private corporation for its private gain in leasing and selling this water power as its own for manufacturing and other industrial purposes—a rival private corporation which, at the nominal price it pays, can successfully compete with and undersell plaintiff in the market, and has so done, and so continues to do! One moment's glance at the *quid* and *pro quo* of this contract. The defendant is to build on *plaintiff's land, with plaintiff's material*, above and below ground, bulkheads, water ways, water gates, tail races, mason work, buildings, and water wheels, and to transmit one hundred, at most, horse power of water power, within the walls of the penitentiary, the place where it is to be used, this being the maximum amount which, according to the contract, can be required for the use and benefit of the penitentiary, and is to pay $2,500 annually, at most, less the deductions provided for, to the directors of the penitentiary for license to commit these trespasses. The contract gives to the defendant "all the

land on the west side of the canal, and the river opposite the walls of the penitentiary." *This includes portion of the western bank of plaintiff's canal; every foot of this land is plaintiff's in fee simple, and so decided in this case.*

This contract further gives to defendant all plaintiff's stone masonry, stone, and other material on plaintiff's land aforesaid, together with the privilege of quarrying and using such other stone, earth, and other material, the property of plaintiff, as may be necessary for the erection and proper execution of defendant's work, the free and uninterrupted use and enjoyment of the right of way along the banks of plaintiff's canal, to and from Gervais street to the works defendant is to erect on plaintiff's land. The Board of Directors is to receive from defendant annually $2,500 for these trespasses on plaintiff's rights and property, the amount to be diminished on a flexible scale, and then, as by a *crescendo* movement, the contract gives defendant at least 400 horse power of water power, plaintiff's property, not one fraction or iota of which is or can, according to the contract, be required by or for the State for the use of the penitentiary, or for any other public purpose whatever. This deal is to endure for a generation—mayhap *in perpetuum*. The iron rule of the Holy Alliance might, by the *vis major*, legalize in European public law the partition of Poland, but the South Carolina Legislature cannot legalize such a transaction as this! No, not even if she had put it in her organic law. *N. O. Gas Co.* v. *La. Light Co.*, 115 U. S., 672, 673; *Woodruff* v. *Trapnal*, 10 How., 187; *Gibbons* v. *Ogden*, 9 Wheat., 74; *Slaughter House Cases*, 16 Wall., 65; *People* v. *Platt*, 17 Johns., 195. And yet, when the power of the South Carolina Legislature to legalize this transaction is questioned by the spoliated plaintiff, we are told the question is frivolous!

Is it frivolous to question the right of the Board of Directors of the penitentiary, or the right of the State, to make such an assignment or lease? When attention is called to the well settled principle of law that "rights arising out of contract cannot be transferred, if they involve a relation of personal confidence, and that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." Pollock on Contracts, 4th ed., 425; *Arkansas Smelting Co.* v. *Belden Co.*, 127 U. S., 388.

Is it frivolous to argue, under the terms and circumstances of this contract, that it was the intention of all those in interest, parties to it, that the right to be furnished with the 500 horse power of water power should not be assignable (*id.*, 127 U. S., 387); and that the non-assignability of this right would be in accordance with the principle mentioned and the other cognate principles relative to the subject?

Is it frivolous to argue that a signification alien to the true one has been put upon the word *absolute* by the State Court? that an erroneous construction has been made by the State Court of the clause in the act of 1887: "*Provided*, That the right of the State to the free use of the said 500 horse power shall be absolute, and any mortgage, assignment or other transfer of said canal by the Board of Trustees or their assigns shall always be subject to this right?" § 7, Act of 1887, 19 S. C. Stat., 1092.

Is it frivolous to argue that the true meaning is, that the State, *qua State*, is to have the [redacted] right to this power, free of charge,—not to pay for it,—and that the canal property cannot be relieved of this servitude to furnish this water power, free of charge to the State, by any mutation in the ownership or possession of the canal?

Rule 21 of this Court provides that the counsel for plaintiff in error shall file with the clerk a printed brief, which shall contain *inter alia* a specification of the errors relied upon, which shall set out separately and particularly each error asserted and intended to be urged. These are shadowed forth in the plaintiff's exceptions to the Circuit decree. The errors already assigned are in compliance with § 997, R. S. U. S. But there are "points growing out of, and connected with, the general Federal questions, and so blended with them as not to be separated, and, therefore, falling equally within the decision contemplated by the 25th section of the judiciary act." *Williams, trustee*, v. *Oliver*, 12 Howard, 124. These, according to the rule, are not required to be filed more than six days before the case itself is called for argument.

Are the following frivolous questions, the decisions upon which by the State Court, adverse to plaintiff, in so far as they were distinctly made, may be regarded as corrollaries flowing from the errors in the decision of the main Federal questions. And those of them not decided in terms were necessarily involved in the decision.

Had a manufacturing corporation been the owner of the canal property and of a manufacturing establishment where the penitentiary is, and had vested in plaintiff the same estate, rights, franchises, and privileges which have been vested in it by the acts of 1887 and 1890, and the conveyances thereunder, subject to a servitude to furnish so much water power free of charge to the manufacturing corporation at the manufacturing establishment for its use, what would be the relative positions and rights of plaintiff and the manufacturing corporation? The right of the manufacturing corporation to this servitude would necessarily be either a right appurtenant annexed to its land or a right in gross; and the servitude of the canal property that of servient estate to the manufacturing establishment as dominant tenement, or a servitude to the manufacturing corporation simply. If the former be the case, then when the easement is assigned to a third person by the grantor, would such assignee take anything? If the latter be the case, then would the assignee take anything, the easement being a personal right and not assignable? *Peek* v. *Conway*, 119 Mass., 546–9; *Ackroyd* v. *Smith*, 10 Common Bench, 1 J. Scott, 187, 70 E. C. L.; *Savage* v. *Mason*, 3 Cushing, 505; *Spensley* v. *Valentine*, 34 Wisc., 160; *Noonan* v. *Orton*, 4 Wisc., 535; *Keppel* v. *Bailey*, 2 M. & K., 537–8, 7 Eng. Ch. Rep. The South Carolina authorities are certainly peculiarly strong in favor of plaintiff's contention in this regard. *Morse* v. *Garner*, 1 Strob., 514; *Whaley* v. *Stevens*, 21 S. C., 223; 27 S. C., 560; *Fisher* v. *Fair*, 34 S. C., 208.

An easement appurtenant or appendant to an estate in fee in the land, or in gross to the person of the grantor for life or years, is incapable of alienation or conveyance in fee. When in gross, it is purely personal to the holder; and when appurtenant, it is attached to, and is an incident to, the land, and passes with it, whether the land be for a term of years, for life, or in fee. *It is an incident to the land, and cannot be separated from or transferred independent of it.* *Kollee* v. *Knecht*, 99 Ill., 366; *Wagner* v. *Hanna*, 38 Cal., 116, 117. Easements of this nature are covenants running with the land; covenants running with incorporeal as well as with corporeal hereditaments. *Van Rensselaer* v. *Reed*, 26 N. Y., 563. No one can have such an easement, but he who has the realty to which it is appendant, while an easement in gross is a mere personal privilege, non-transferable, and cannot be made so.

If such be the law on the transfer of such an easement by a manu-

facturing corporation, is defendant in any better plight by its contract and the act of 1892?

The easement in question, the right of the State to be furnished with and the obligation of the plaintiff to furnish the water power to the State is, on any fair principle of construction of the contract, limited to a particular purpose, a *State* purpose of public utility. *Strong* v. *Benedict*, 5 Conn., 219; *Turlelott* v. *Pheps*, 4 Gray, 374; *Sibley* v. *Hoar*, 4 Gray, 222; *Garland* v. *Hodson*, 46 Me., 515; *Washabaugh* v. *Oyster*, 6 Pa. St., 497; *Deshon* v. *Porter*, 28 Me., 289; *Stockbridge Iron Co.* v. *Hudson Iron Co.*, 107 Mass., 291, 309, 324.

Beside the restriction to the *locus*, the penitentiary, and that to the *use* of the penitentiary, the State had let fall the management of the canal, discontinued its appropriations, and did not go into the business of renting water power, and manufacturing for gain, and, under the law, could not.

"The State has not the right to engage in any trade or business for gain." *Mauldin* v. *Greenville*, 33 S. C., 1. What the State cannot do directly, it cannot do indirectly. *Qui facit per alium, facit per se.*

Is it a frivolous question whether the holding of Gary, A. J. (even if a mere *dictum*, as plaintiff contends), that the right of the State to the power is "a right of *profit a prendre*," is correct or not? when such consequences seem to flow from it, and when plaintiff contends, under Godard on Easements, p. 771; Gould on Waters, §§ 299, 310; Angell on Water Courses, §§ 142, 143, 7th ed., that it is an easement, and not a *profit a prendre*, the reason being that water is not a part of the produce of the soil, and is not the property of the owner of the land over which it flows, or on which it is standing. Is it a frivolous question to contend that under the contract of the State with the plaintiff "the use of the water power was confined to a special place and to a specified purpose?" Gary, A. J., Record, p. 32, fol. 61.

In addition to these questions, it may be necessary that plaintiff should ask to be allowed to argue before this Court what is said in the opinion of Gary, A. J., as to the State being a necessary party to this action, as to its equitable features, which plaintiff contends is only an individual *dictum*, and to show the reverse of this to be correct, and that this is established by the cases of *Poindexter* v. *Greenhow*, 114 U. S., 293; *Allen* v. *B. & O. R. R. Co.*, 114 U. S., 311, and others of that type, as effectually in regard to so much of the matters as involve plaintiff's right to an injunction, as is established by the case of *U. S.* v. *Lee*, 106 U. S., 196, and others of that type, in regard to plaintiff's right for pecuniary compensation for the injuries inflicted on its property.

The action was neither in form or substance against the State. It is at most a contest between a prior and subsequent grantee from the State—an action by one private corporation, plaintiff, against another private corporation, defendant, as a wrong doer in its private capacity for certain trespasses upon the property and rights of plaintiff already committed, and for the prevention of others about to be committed, a joinder sanctioned by the highest authority, State and Federal. *Bird* v. *R. R. Co.*, 8 Rich. Eq., 46; 64 A. D., 739; *Lamar* v. *R. R. Co.*, 10 S. C., 480; *Busby* v. *Mitchell*, 29 S. C., 452; *Tyler* v. *Maguire*, 17 Wall., 284, 285.

The sole justification for defendant's trespasses is the act of 1892, approving and ratifying the contract of 1892, which were challenged by the plaintiff both before the Circuit and State Supreme Courts, as

made in violation of the provisions of the Federal Constitution, that no State shall pass any law impairing the obligation of contracts, and that no State shall deprive any person of property without due process of law. This last pronibition extends to all acts of the State, whether through its legislative, executive or judicial authorities. *Scott* v. *McNeall*, 154 U. S., 45.

The State Courts have on this issue decided in favor of defendant, decided that this contract and act are not repugnant to the Federal Constitution.

This is the sole *fonset origo* of plaintiff's resort to this Court. As the jurisdictional question, it may be fairly assumed, is the one on which defendant relies in this controversy, plaintiff closes the views it submits, whose extended length can be justified only by the importance of this Court's decision, to the present well being and future prospects of plaintiff, by the citation of these additional authorities in support of the jurisdiction: *Hall* v. *Decuir*, 99 U. S., 500; *Delmas* v. *Ins. Co.*, 14 Wallace, 688; *State Bk. of Ohio* v. *Knoop*, 16 How., 391; *Ohio Ins. L. & Trust Co.* v. *DeBolt*, 16 How., 422, 423; and by these to show that the right of the State to the water power is an easement, not a *profit a prendre*. *Manning* v. *Wasdall*, 2 Harr. & Woll., 441; 3 Kent, 427; *Hill* v. *Lord*, 48 Me., 49; *Post* v. *Pearsall*, 22 Wend., 433; *Prince* v. *Heator*, 70 N. Y., 421; *Ritzer* v. *Parker*, 8 Cush., 147; *Huntingdon* v. *Asher*, 96 N. Y., 505; and that it is a right to it only for the use of the penitentiary, a right which the State cannot sell or lease. *Rochdale Canal Co.* v. *Radcliffe*, 18 Adol & Ellis, N. S., 307–311; 83 E. C. L.

LEROY F. YOUMANS,
For Plaintiff in Error.

THE STATE OF SOUTH CAROLINA.
IN THE SUPREME COURT.

THE COLUMBIA WATER POWER COMPANY, PLAINTIFF, APPELLANT,

against

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, DEFENDANT, RESPONDENT.

To the Honorable Henry McIver, Chief Justice of the Supreme Court of the State of South Carolina:

The petition of the Columbia Water Power Company showeth, that on the 18th day of February, 1895, this Court entered a final judgment herein in favor of the defendant, The Columbia Electric Street Railway Light and Power Company, against this plaintiff, in which judgment, and the proceedings had prior thereunto in this cause, certain errors were committed, to the prejudice of this plaintiff, some of which will more in detail appear from the assignment of errors which accompanies this petition. Wherefore this plaintiff prays that a writ of error may issue in this behalf to the Supreme Court of the State of South Carolina, for the correction of errors so complained of, and that a transcript of the record and proceedings in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

ABNEY & THOMAS,
BACHMAN & YOUMANS,
Plaintiff's Attorneys.

January, 1897.

Be it so, the plaintiff giving bond, according to law, in the sum of five hundred dollars on the issuing of the citation.

HENRY MCIVER,
Chief Justice of the Supreme Court of South Carolina.

January, 1897.

THE STATE OF SOUTH CAROLINA.
IN THE SUPREME COURT.

THE COLUMBIA WATER POWER COMPANY, *Plaintiff, Appellant,*
against
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, *Defendant, Respondent.*

The plaintiff in this action, in connection with its petition for a writ of error, makes the following assignments of error, which it avers occurred in the judgment herein, and the proceedings prior thereunto had in this case.

That error was committed in deciding in favor of the validity of the

contract between the defendant and the Board of Directors of the South Carolina Penitentiary, May 26, 1892, and the act of the General Assembly of the State of South Carolina, December 24, 1892, which were drawn in question, on the ground of their being repugnant to the Constitution of the United States, in this, that they impaired the obligation of the contract made by the State of South Carolina, act December 24, 1887, as to the rights, franchises, and privileges of plaintiff, as owner in fee of the property known as the Columbia Canal, and more especially as to the plaintiff's sole and exclusive right, franchise, and privilege to sell and lease the water power developed by said canal, and as to the five hundred horse power of water power to be furnished to the said State; and in this, that they deprived plaintiff of its property without due process of law.

ABNEY & THOMAS,
BACHMAN & YOUMANS,
Plaintiff's Attorneys.

January, 1897.

I, U. R. Brooks, Clerk of the Supreme Court of the State of South Carolina, do hereby certify that the foregoing is a true and correct copy of the originals on file in my office. In witness whereof, I have hereunto affixed my hand and the seal of the Supreme Court, this 6th day of May, A. D. 1897, at Columbia, S. C.

[Seal.]

U. R. BROOKS,
Clerk Supreme Court of S. C.

Although the petition to the Chief Justice of the State Supreme Court for allowance of the writ of error constitutes no portion of the record proper (*Warfield* v. *Chaffee*, 91 U. S., 692; *Clark* v. *Pennsylvania*, 128 U. S., 397), yet, as the assignment of errors accompanying said petition shows the grounds on which, and on the decision of what questions, said Chief Justice allowed the issuance of said writ, the plaintiff prays that the original of the foregoing certificate be filed with the record.

LEROY F. YOUMANS,
For Plaintiff in Error.

FILED.
OCT 10 1898
JAMES H. McKENNEY,
CLERK

No. 67.

Brief of Youmans for P. E.

Filed Oct. 10, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 67.

THE COLUMBIA WATER POWER COMPANY, PLAINTIFF IN ERROR,

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

LEROY F. YOUMANS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 317.

THE COLUMBIA WATER POWER COMPANY, PLAINTIFF IN ERROR,

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, DEFENDANT IN ERROR.

STATEMENT.

By regular conveyance from the Board of Trustees of the Columbia Canal, January 11, 1892, the plaintiff below, the plaintiff in error here, became the owner in fee, for value, of all the property, situate in and near the city of Columbia, South Carolina, known as "The Columbia Canal," and of all the lands held therewith, acquired under the Acts of the General Assembly of the said State, with reference thereto, or otherwise, from its source through its whole length to the point where it empties into the Congaree River. Portion of the realty of which plaintiff thus became owner in fee constituted the *western* embankment of the canal; upon one portion of which embankment the defendant, in February, 1893, despite the reiterated objections, protests, remonstrances and warnings of plaintiff, forcibly entered, dug, excavated and removed the earth, rock and works composing the foundation of the embankment, to the great damage of the embankment, *and to the great danger of the safety of the canal*, and erected steam engines, boilers and buildings thereon; and upon another portion of which embankment, later in May, 1893, despite the like reiterated objections, protests, remonstrances and warnings of plaintiff, defendant forcibly entered and erected thereon a boiler house, coal house, machinery and buildings. These trespasses of defendant are set out in paragraphs 12 and 13 of the complaint.

Transcript of Record, pp. 9, 10, fols. 19, 20.

By the same conveyance, the plaintiff became vested in fee for value, *inter alia*, with all the rights, franchises, privileges, immunities and property which had been conferred by the Acts of the

General Assembly of the said State upon the Board of Trustees of the Columbia Canal.

Among these rights, franchises, privileges, immunities and properties, an essential one, *the* essential one, that which induced the purchase, and without which there would have been no purchase, and no sufficient inducement to plaintiff to make the purchase, was the exclusive right, franchise and privilege conferred by the State to own and control, "to sell or lease the water power of the canal, subject to such rules and regulations as plaintiff should prescribe." (§ *21, A. A. 1887, 19 Stat. So. Ca., 1096;* § *2, A. A. 1890, 20 St. So. Ca., 968*), with immunity from any let or hindrance from the State, or any person or corporation, to interfere with its control, use and disposal of said water power.

This right, privilege, franchise, was exclusive, because the Broad and Congaree Rivers, to connect which by water was one of the purposes of the canal, being both navigable streams, and the State being the owner of the canal and of both banks thereof, and of the circumjacent lands, with all the rights of riparian proprietor, this right had been exclusive in it; and it was transferred for value and vested in plaintiff by the Acts of Assembly just cited, and the conveyance in fee from the Board of Trustees of the Columbia Canal. With immunity from any let or hindrance on the part of the State or any person or corporation, most especially any person or corporation a subsequent grantee, claiming under the State, because of the inherent nature of the purchase and contract, the payment of the purchase money, the deed of conveyance, the faith of the sovereign, plighted in its solemn legislative Acts and contract, and the guarantee of the Constitution of the United States. For, "It has become the established law of this Court" (the Supreme Court of the United States) "that a legislative enactment in the form of a statute, may contain provisions which, when accepted as the basis of action, by individuals or corporations, become contracts between them and the State, within the protection of the clause referred to of the Federal Constitution"—the clause declaring that no State shall pass any law impairing the obligation of a contract. *New Jersey* v. *Yard, 95 U. S., 113, 114.* Such, indisputably, is the case here.

By the terms of this contract there was imposed on plaintiff a duty, the only one in any way involved in or bearing upon this controversy, and on this Court's construction of which much of plaintiff's contention (except as to what is set out in paragraphs 12 and 13 of the complaint above referred to) must depend.

This duty is to furnish to the State, free of charge, on the line of the canal at the Penitentiary, *for the use of the Penitentiary*, 500 horse power of water power (§§ *2, 7, 21, A. A. 1887, 19 Stat. So. Ca., 1091, 1092, 1096*); a duty which the plaintiff has ever been ready and willing to perform from the time this duty attached, and of the non-performance of which there never has been, nor can

there be, complaint. Plaintiff's contention is, that the State is entitled to this amount of water power *qua* State, and only so, for the use of the Penitentiary, and for that use only, that use well defined by the State "for manufacturing purposes within the walls of the enclosure of the Penitentiary" (*A. A. 1866*, § *2*, *13 St. So. Ca.*, *393*), "for the use of the Penitentiary, to meet the demands of its ordinary operations and other industries conducted and carried on within its walls." *A. A. 1882*, § *6*, *17 St.*, *856*.

A fortiori, that in no event could this use extend beyond that by the State itself in its public institutions, where the same was needful for public wants and requirements, and least of all to the private gain and profits of corporations, the rivals of plaintiff in selling and leasing water power. The *gravamen* of plaintiff's complaint in this regard is that, under the authority of the State, defendant has diverted, and continues and will continue, unless restrained by the Court, to divert the horse power of water power furnished by plaintiff in the discharge of this duty imposed upon it for the use of the penitentiary from that use, and has applied, continues to, and will continue to apply this water power to its own private uses of profit and gain outside the walls of the Penitentiary, operating with it its electric lights and street railways, and selling, leasing, and furnishing this water power to various manufacturing and other industries, and thus bringing itself into successful competition with and underselling plaintiff in selling, leasing and furnishing the water power of the canal, the exclusive right, franchise, and privilege of which the plaintiff had acquired by the contract by which it purchased the canal, lands, rights, franchises and privileges conferred by the Acts of Assembly aforesaid. The plaintiff corporation, having been organized *inter alia*, "to utilize water power upon their own property, and to acquire by purchase, canals and other waterways, and to sell and lease the use of their water power from any canals it might own to any person or corporation, for the purpose of manufacturing of any description whatsoever," under its charter, October 5, 1891 (*20 Stat.*, *1512*, R. M. C. Richland County, Book A of Corporations, 32); and this canal and the exclusive right of selling and leasing the water power developed by it having been purchased by plaintiff, it will be seen at a glance that the objects alike of the formation of the plaintiff corporation and of the purchase of the canal, lands, rights, privileges and immunities, were, *pro tanto*, destroyed. Not content with this, the defendant forcibly made the entries and committed the continuous torts on the western embankment of plaintiff's canal, set out in paragraphs 12 and 13 of the complaint. *Record*, *pp. 9*, *10*, *fols. 19*, *20*.

Though all the corporators were citizens of States other than South Carolina, yet as plaintiff and defendant were both South Carolina corporations, the only tribunal to which plaintiff could have recourse was the Court of Common Pleas for Richland County, South Carolina, the county of the *locus*, for an injunction to re-

strain defendant from the unlawful diversion of the water power furnished by it for the use of the Penitentiary from that use to the private use and profit of the defendant, and from entering, trespassing and erecting and continuing the erection of buildings, works and machinery upon plaintiff's property, and requiring the removal of those already erected, and for an assessment of such damages as may have been done by defendant to plaintiff in the premises.

The defendant, in its answer, places the justification of the acts threatened and injuries done to plaintiff, which it admits, solely on the alleged ground that they found full warrant of law in the articles of agreement made between the Superintendent of the Penitentiary, for its Board of Directors, and the defendant, May 26, 1892, *Record, p. 16*, and the Act of the General Assembly of the State of South Carolina, ratifying and confirming the same, *A. A. December 24, 1892, 21 Stat. So. Ca., 95.* According to the South Carolina law and practice, the allegations of new matter in an answer, where it does not constitute a counter-claim, and there is no pretense of counter-claim here, are deemed controverted by plaintiff as upon a direct denial or avoidance, as the case may require, without further pleading; in such case there being no reply by plaintiff allowed, unless the Court should require it, on defendant's motion. *So. Ca. Code of Procedure, §§ 174, 189.* The controversion by plaintiff of this justification set up by the answer, was that the contract and Act of Assembly pleaded by defendant were in violation of those provisions of the Federal Constitution which inhibit a State from passing any law impairing the obligation of contracts, and from depriving any person of property without due process of law, in this, that they impaired the obligation of the prior contract with plaintiff as to its property and franchises, and deprived it of its property by simple legislative fiat.

The Circuit Court's decree (*Transcript of Record, pp. 20, fol. 38,*) was:

1. That the objection, raised orally by defendant's counsel, after the trial had commenced and been some time in progress (*page 20, fol. 37*), that the Court had no jurisdiction, because the State is an indispensable party, is overruled. The Court has jurisdiction to construe a contract made between the defendant and the State, whereby it is claimed that the contract rights of the plaintiff have been violated. The door is not shut to plaintiff because of defendant's contract with the State; the State has a right to come in, if she so wishes, but she declares that she will not come in (*Record, 15, fol. 29*), and the cause can be heard without her presence.

2. That under the proper construction of the State's contract with the plaintiff, the right and power of the State over the use and disposal of the 500 horse power of water power to be furnished by the plaintiff to the State, and over that 500 horse power of water power itself were not limited for the use of the Penitentiary or otherwise, but were absolute, unlimited and unrestricted, and

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that the State could dispose of, utilize, assign and transfer this water power in any way and for any uses and purposes she pleased.

3. That under the proper construction of the State's contract with the plaintiff, and the subsequent contract with the Board of Directors of the State Penitentiary, approved and ratified by the State, the State had lawfully given to the defendant absolute, unlimited and unrestricted right and power over this water power, and over the use and disposal of it; and there was in this subsequent contract and Act of Assembly no impairment by the State of the obligation of the State's prior contract with the plaintiff within the inhibition of the Federal Constitution.

4. That by the contract of the State with the plaintiff, Act of 1887 and conveyance of January 11, 1892, the plaintiff became the owner in fee of the western embankment of the canal, where the defendant, in February and May, 1893, committed the acts set out in paragraphs 12 and 13 of the complaint, alleged by plaintiff to be torts.

5. That the contract with defendant, made subsequent to that made with plaintiff, to wit: May 26, 1892, and the Act of Assembly of December 24, 1892, while they legalize and justify these acts of defendant committed in February and May, 1893, and give defendant the unquestionable right to put its electric plant, and the supplementary right to put in its steam plant, on the western embankment of plaintiff's canal, against plaintiff's objection, yet they do not in any wise impair the obligation of the State's prior contract with plaintiff, and do not in any wise deprive plaintiff of its property without due process of law.

6. There has been no impairment of the obligation of plaintiff's contract with the State, and no violation of its rights thereunder; therefore, it is adjudged, that the complaint be dismissed.

The cause was duly carried up to the State Supreme Court by plaintiff on appeal (*Record, p. 22, fol. 41,*) from so much of the decree of the Circuit Court:

(1) As holds that the defendant is a lessee of the water power reserved.

(2) As holds that there is any valid contract between the State and the defendant.

(3) And from all that portion of the decree commencing with and inclusive of the sentence (*Record, p. 20, fol. 39*), "plaintiff acquired its rights under the Act of 1887," and ending with and inclusive of the sentence, "Therefore, I hold that the complaint must be dismissed."

(4) And from the ordering and adjudging that the complaint be dismissed.

This appeal was heard by the State Supreme Court on exceptions taken by plaintiff and by defendant. *Record, pp. 23–25.*

Among plaintiff's exceptions, most of which charge, with more or less distinctness and precision, errors in the Circuit decree in

the decision of Federal questions adversely to plaintiff, in the construction of the contract with plaintiff, and the contract of the defendant, and the Acts of Assembly involved, and the rights of the parties to said contracts under these contracts and statutes, and as to whether the contract with defendant and of the Act of Assembly of December 24, 1892, are not within the inhibitions of the Federal Constitution, to all of which exceptions attention is called, it may suffice to call attention specially to the error in deciding No. 7, "That the State can dispose of its right to the 500 horse power of water power in any way the State pleases;" and to the errors in deciding Nos. 5, 1, 2, 4, 13, that the contract with defendant, and the Act of Assembly ratifying and confirming the same, give defendant all of the rights which the State had in this water power, without violating the State's prior contract with the plaintiff; and the error in deciding Nos. 8, 10, 11, 12, 13, that the contract with defendant, and the Act ratifying and confirming the same, give defendant the right to put the electric plant and the supplementary right to put in the steam plant, and to do the acts complained of in 12th and 13th paragraphs of the complaint, without violating the State's prior contract with the plaintiff; and to the errors in not deciding, as in No. 25, that the 500 horse power of water power to which the State is entitled under Act December 24, 1887, belongs to the State, as State, for the use of the South Carolina Penitentiary for State public purposes exclusively, is attached to and not severable from the State, as State, for the use of the Penitentiary, and to be used for said purposes, and said purposes only; and error in not deciding, as in No. 21, that the Act of December 24, 1892, mentioned in the 6th paragraph of the answer, is in violation of Section 10, Article 1, Constitution of the United States, declaring that no State shall pass any law impairing the obligation of contracts, in this, that it impairs the contract made by the State in A. A. December 24, 1887, as to the rights, franchises and privileges of the owners of the property known as the Columbia Canal, and the lands held therewith as owners in fee thereof, and more especially as to the sole and exclusive right, franchise and privilege to sell and lease the water power developed by said canal.

This Circuit decree was *res judicata*, and the law of the case until its reversal by two of the Judges of the State Supreme Court. The Constitution of South Carolina of 1868, then in force (*Art. IV., Sec. 12*), providing that "In all cases decided by the Supreme Court, a concurrence of two of the Judges shall be necessary to a decision," and the Code of Procedure (*§ 14, 2 Rev. St. So. Ca., 9,*) providing that "The concurrence of two Judges of the Supreme Court is necessary to pronounce a judgment." By the Constitution of 1868, then of force (*Art. IV., §§ 2 and 9*), the Supreme Court of that State then consisted of three Judges, to wit: a Chief Justice and two Associate Justices. It was further provided by the same Constitution (*Art. IV., § 8*): "When a judgment or decree is re-

versed or affirmed by the Supreme Court, every point made and distinctly stated in writing in the cause, and fairly arising upon the record of the case, shall be considered and decided, and the reasons therefor shall be concisely and briefly stated in writing, and preserved with the records of the case."

In this case, the sole portion of the Circuit decree as to which there was concurrence by two of the Judges of the Supreme Court, either in affirmance or reversal, was the *result* (*i. e.*, that the complaint be dismissed). *Record, p. 34, fol. 64, p. 21, last line; 43 So. Ca., 154-173.* From this it follows, *ex necessitate* and by established law, that, however valuable and however much entitled to respect the *individual* expressions of each of the three judges of the State Supreme Court may be as the *individual* opinions of three personages of high judicial rank, yet, in so far as regards this controversy, they are mere individual *obiter dicta;* so that the action here in question is that of the Circuit Court, affirmed *expressly* as to the result by the State Supreme Court, and in all other respects affirmed impliedly by the non-action of that tribunal.

"The points ruled in the Circuit Court were adopted and affirmed by the judgment rendered in the State Supreme Court in like manner that they would have been had two or all of its Judges concurred in affirming the judgment on all the grounds assumed by the Court below." *Lessieur* v. *Price, 12 How., 72; Ex parte Elliott, 33 S. C., 604.* So that while Nos. 1 and 4 of the above summary of the Circuit decree are unchallenged, *res judicata*, Nos. 2, 3, 5, and 6 thereof only come before this Court for consideration.

ERRORS ASSIGNED.

1. That error was committed in the judgment of the Supreme Court of the State of South Carolina, in affirming the judgment of the Circuit Court that the complaint be dismissed, and in deciding in favor of the validity of the contract between the defendant and the Board of Directors of the South Carolina Penitentiary, May 26, 1892, and the Act of the General Assembly of the State of South Carolina, December 24, 1892, ratifying and confirming the same, which were drawn in question on the ground of their being repugnant to the Constitution of the United States of America, in this, that they impaired the obligation of the contract made by the State of South Carolina with the plaintiff by Act of Assembly, December 24, 1887, Act of December 24, 1890, amending the same, and the conveyance of the property known as the Columbia Canal and the lands held therewith, by the Board of Trustees of the Columbia Canal to plaintiff, January 11, 1892—as to the lands, rights, franchises, privileges and immunities of plaintiff as owner in fee thereof, and more especially as to the western embankment of said canal, and plaintiff's sole and exclusive right and franchise to sell and lease the water power developed by said canal, and as to the 500

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horse power of water power to be furnished by plaintiff to the State, contrary to Art. I., § 10, of the Constitution of the United States; and in this that they deprived plaintiff of its land and other property without due process of law, contrary to 14th Amendment to said Constitution.

2. That there was error in deciding that, under the proper construction of the State's contract with the plaintiff, the right and power of the State over the 500 horse power of water power to be furnished by the plaintiff to the State, and over the use and disposal thereof were not limited for the use of the Penitentiary, but were absolute, unlimited and unrestricted, and that the State could dispose of, utilize, assign and transfer this water power in any way and for any uses and purposes she pleased.

3. That there was error in deciding that, under the proper construction of the State's contract with the plaintiff, and the subsequent contract made by the defendant with the Board of Directors of the State Penitentiary, and the Act of Assembly, December 24, 1892, confirming and ratifying the same, the State had lawfully given to the defendant absolute, unlimited and unrestricted right and power over this water power, and over the use and disposal of it, including the right and power to lease and sell it for defendant's private profit and gain; and that there was in this subsequent contract and Act of Assembly no impairment by the State of the obligation of the State's prior contract with the plaintiff, within the inhibition of the Constitution of the United States, Art. I., § 10.

4. That there was error in deciding that this subsequent contract with defendant, and Act of Assembly ratifying and confirming the same, while they legalized and justified the forcible entries and doings of defendant in February and May, 1893, on the western embankment of plaintiff's canal, set out in paragraphs 12 and 13 of the complaint, and give the defendant the unquestionable right to put the electric plant and the supplementary right to put in the steam plant on said embankment, against plaintiff's objection, yet do not in any wise impair the obligation of the State's prior contract with plaintiff, whereby the plaintiff became owner in fee of the canal, including said western embankment, in violation of the Constitution of the United States, Art. I., § 10, and do not in any wise deprive plaintiff of its property without due process of law, in violation of the 14th Amendment of said Constitution.

5. That there has been no violation of plaintiff's rights.

While, for the reasons given, it does not seem to be at all necessary or in any wise required of plaintiff to make any assignments of error in the individual views expressed by any of the Judges of the State Supreme Court, yet, as some of these views may be relied on by the defendant in error as somewhat authoritative, *ex abundanti cautela*, it is deemed proper to make these assignments of error, in the opinion of Gary, A. J.:

1. That there is error in his holding that the State is an indispensable party to this action, in so far as equitable relief is sought.

2. That the use of the word "absolute," in § 7 of A. A. 1887, was for the purpose of creating a right in the State to this 500 horse power of water power, separable and distinct from the ownership in other lands, and not dependent upon any particular lands to which it may be appurtenant, and its reservation was a right of *profit a prendre.*

POINTS OF LAW.

The questions before this Court are all questions of law, pure and simple. There was in the Courts below but one controverted question of fact—*i. e.*, whether the plaintiff had or had not acquired by its contract with the State. title from the State to the *locus in quo.* This is apparent from defendant's answer. Paragraps 1, 4, 6, *Record, pp. 12-14.* It is equally apparent that this question has been conclusively settled and adjudicated affirmatively in plaintiff's favor. The Circuit decree says: "The State conveyed the canal property to the plaintiff, and thereby conveyed in fee all of the property known as 'the canal property,' including its banks, as it existed at the time of the conveyance. And at the time of the Act of 1887, and of the conveyance made thereunder 11th January, 1892, the canal property covered the land upon which the defendant's works are erected." *Record, fol. 20, p. 38.* "The canal property included the strip of land upon which the steam plant was erected." *P. 27, fol. 50.* "A finding of fact, in effect, that the plaintiff is owner in fee of the land described in the complaint." *P. 34, fol. 64,* for whose extent see paragraphs 2 and 5 of complaint. *Record, pp. 2, 3, 4, fols. 6-9.* It was on the western embankment of the canal, portion of this land of plaintiff's, that defendant made the forcible entries, and committed the torts set out in paragraphs 12 and 13 of the complaint.

The questions of law involved naturally range themselves under two heads:

First. As to the injuries threatened and the injuries inflicted upon plaintiff's property, against its objection, by the forcible entries of defendant upon the western embankment of plaintiff's canal, the digging, excavation and removal of the earth, rock and works composing the foundation of the embankment, to the great damage thereof, and to the great danger of the safety of plaintiff's canal, the erection, without authority, of buildings and machinery upon this western embankment of plaintiff's canal, and the unlawful use of plaintiff's land and property.

Second. As to the diversion by defendant of the water power furnished by plaintiff to the State for the use of the Penitentiary, from that use to defendant's own private purposes and uses of gain and profit, and defendant's competition with plaintiff in leasing and selling the water power developed by plaintiff's canal.

First Head.

It is proper to premise that, under the law in South Carolina, and the Code of Procedure enacted by its Legislature, all the allegations of plaintiff's complaint, not denied by defendant's answer, are admitted. *So. Ca. Code of Procedure, §§ 170, 189; 2 Rev. St. So. Ca., pp. 75, 85; Addison* v. *Duncan, 35 So. Ca., 173.* It will be seen by the answer that none of the allegations of paragraphs 12 and 13 of the complaint are denied by the answer, save that in paragraph 4 of the answer there is a denial of *intention* by defendant to injure plaintiff by its acts, set out in 12th and 13th paragraphs of the complaint; and a denial also that the structures erected and maintained by defendant are located upon any land in which the plaintiff has any interest whatever. The denial of the intention to injure plaintiff, and the existence or non-existence of that intention, are alike equally immaterial in this controversy; for there is no demand for vindictive damages, but only for actual damages, compensation for the injuries, on the amount of which this intention or want of intention can have no effect whatever.

As to the denial that plaintiff has *any interest* in the bank of its own canal, on which defendant's structures are erected, this, as we have seen, has been effectually set at rest by the judgments of the Courts below that the plaintiff is owner in fee by conveyance from the State. That the acts alleged in the 12th and 13th paragraphs of the complaint were committed, as charged, upon plaintiff's property—not isolated and mere technical trespasses, but continuous torts, torts with a *continuando*, if torts at all, endangering the safety of plaintiff's canal, is *res judicata.* And while, for the reasons already given, the sole cause stated by McIver, C. J., of the State Supreme Court, and by him alone, for his concurrence in the result arrived at by that Court, "as I am not satisfied that plaintiff ever acquired a title to the land upon which the works in question have *been erected* by defendant, for this does not depend solely upon the solution of a question of fact, as seems to be supposed" (*Record, 34, fol. 64*), is his mere *individual* doubt; yet it would seem that this solution of the question of law involved, if there be a question of law involved, should give satisfaction in this regard. "*Canal* is unlike the words river, pond, lake and other words used to designate natural bodies of water, the ordinary meaning of which is confined to the water itself; *but the word canal includes the banks.*" *Bishop* v. *Seeley, 18 Conn., 393.* Does it need reasoning or citation of authority to show that when the State, owning the canal, its banks and the circumjacent lands, conveyed this property in fee to the plaintiff, the plaintiff acquired from the State, as matter of law as well as of fact, title to the banks of its canal? and most especially against the State and its subsequent grantees, of all persons?

The whole controversy, outside of the questions of violation of the

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Federal Constitution, *is between* the rights of a prior and a subsequent grantee of the same property from the same grantor, and is settled by the old rule of Coke (Co. Litt., 14a), "*Quod prius est dignius*, and *qui prior est tempore potior est jure*." "This rule shows, says Sugden, in his argument in *Cholmondeley* v. *Clinton*, *2 Meriv., 329*, "that when parties come into Court and claim under conflicting rights, the Court will ask, not who was first in possession, but under what instrument, or how is your right dated in point of time." *Scott* v. *Scott*, *4 H. L. Cases*, *1065*, *1082*. Here plaintiff was first in time of possession, in instrument and in right.

Paragraph VI. of defendant's answer alleges that the State, by the Board of Directors of its Penitentiary, entered into the contract of May 26, 1892. This contract being at least an agreement made by the Board of Directors of the Penitentiary, the agents of the State, by its authority, is an enactment to which the State gave the force of law by the Act of December 24, 1892, and is a statute within the meaning of Rev. Stat., § 709, relating to the jurisdiction of the Court. It is so expressly decided. *Wright* v. *Nagle*, *101 U. S., 793; N. O. Water Works* v. *La Sugar Co.*, *125 U. S., 31; Williams* v. *Bruffy*, *96 U. S., 183; Jefferson Branch Bank* v. *Skelly*, *1 Black*, *443*, *last sentence on page; Mobile Railway Co.* v. *Nebraska*, *146 U. S., 446*, *447*. The prohibition of the 14th Amendment extends to all acts of the State, whether through its legislative, executive or judicial authorities. *Scott* v. *McNeal*, *154 U. S., 45*.

Before considering the reasoning by which it is sought to justify in this regard this contract and Act of 1892, and the conduct of defendant having its sole defence thereunder set out in paragraphs 12 and 13 of the complaint, and to show that what the State did in no manner impaired the obligation of the State's prior contract with plaintiff, and did not deprive plaintiff of its property without due process of law, and that these acts of defendant were no violation of plaintiff's rights under its contract with the State, attention should be directed to the terms of the contract and Act of 1892, and the conduct of defendant in this regard.

This contract purports to lease to defendant, for thirty years, with provision for continuance thereafter, "all the land on the west side of the Columbia Canal, between the said canal and the river, opposite the walls of the Penitentiary." *This includes the portion of the western embankment, the western bank of plaintiff's canal, on which defendant erected and continues its structures, every foot of which is plaintiff's in fee simple, and so adjudged in this case.* This contract further purports to transfer to defendant for the same period other valuable property of plaintiff mentioned, and what it styles the privilege, but what is unquestionably the exclusive right of plaintiff *de jure et de facto* of quarrying and using the stone, earth and other material, the property of plaintiff, for the erection of bulkheads, water works, water ways, water gates, tail races, mason work

and buildings on plaintiff's property, for defendant's benefit, for the same period. *Record, p. 18, fols. 34, 35.* It is proper to call the attention of the Court specially to the fact, that prior to defendant's action set out in paragraphs 12 and 13 of the complaint, an agreement had been made and carried into execution, as to the *modus* of furnishing the State, for the use of the Penitentiary, with the 500 horse power of water power, which it was the duty of the plaintiff to furnish in accordance with its contract. *Paragraphs 10 and 11 of the complaint, pp. 7–9 of Record*, whose allegations in this regard are not denied, and, therefore, admitted. Defendant is confined to these specifications and plans of the *modus*, proposed by defendant itself, approved by plaintiff and carried into execution by defendant. *Gould on Waters, § 318a, and notes 3, 4, 5 and 6.* In *Altman* v. *McBride, 4 Strob. Rpts. (So. Ca.), 210, 212*, the Court says, as to these words in a deed of conveyance: "A square acre containing the family grave yard." No one would doubt that after the deed of conveyance was executed, the parties might mark out the precise spot, and if it should happen to be a few feet longer, or not exactly square, embracing a few square yards more than the area of an acre, it would not be in the power of either to alter it." And so *e converso*, if it should happen to be a few feet smaller, and not exactly square. Onthank v Lake Shore 71 N Y 194

But here the identical paper specifications, plans and *quantum* of land agreed to are exactly carried into execution. From this adjustment of the *modus* of the plaintiff's furnishing the water power to the State carried into execution, it necessarily follows that no justification for the subsequent conduct of the defendant, alleged in paragraphs 12 and 13 of the complaint, can be based on that portion of the contract which purports to lease this water power to defendant, even if it be granted, for the sake of argument, that the State could make such a lease of this water power as it has done, without coming within the inhibitions of the Federal Constitution. In regard to this conduct of defendant, it must always be remembered that it has, in addition to all other trespasses upon and injuries done to the property of plaintiff, against the objection of plaintiff, so dug, excavated and removed the earth, rock and works composing the foundation of the embankment of plaintiff's canal as to greatly damage the embankment and greatly endanger the canal itself.

The Circuit decree seems to rest its conclusion that the State's action in this regard does not come within the inhibitions of the Federal Constitution, and that defendant's conduct, set forth in 12th and 13th paragraphs of the complaint, is no violation of plaintiff's rights under its prior contract with the State, on the ground taken that the State has, by its subsequent contract with defendant, given to defendant "the *supplementary* right to *put in* a steam plant—to erect on the banks of plaintiff's canal so much

Injunction will lie against an excavation threatening serious injury to land or buildings having only right of support from adjoining land Farrand v Marshall

steam plant as is necessary to its work as a *supplement* to the water power which it has received from the State."

Upon the most cursory reading of the State's contracts with plaintiff and defendant, a host of objections spring up, each equally fatal to this portion of the decree. Attention will be called to only a few of the most obvious of these.

1. The State has no supplemental right to give. Its right was to be furnished with 500 horse power of water power—only this and nothing more. Courts may construe contracts, and in some cases it has been held that the Court, from the various terms of agreement between parties, some in consonance and some at variance with each other, some clear, some obscure, some ambiguous, some connected, some disconnected, some dependent, some independent, may construct a contract, but neither Court nor Legislature can supplement the contract rights of the parties to a contract.

2. The contract by none of its terms purports to give any such supplementary right. If so, it can be pointed out. *De non apparentibus, et non existentibus, eadem est ratio.*

An exemption from taxation of "any improvements that may be made upon the water power on the Matanancook stream, in the town of Lincoln, does not include steam power." *Plaisted* v. *Inhabitants of Lincoln, 62 Maine, 91.*

However admirable may be the logic of the Circuit decree, to wit: that "prudence and foresight justify the erection of a steam plant on the banks of a canal along a river where freshets come, and it is common to use steam as an adjunct to water power plants," maybe to show the *advisability* of defendant's erecting it on the banks of *its own* canal; yet it is most certainly a *non sequitur* to hold that, *ergo*, defendant has a *supplementary* right to erect a steam plant on the banks of *plaintiff's* canal. However common for owners of water power plants to erect steam adjuncts on their own land it may be, this certainly furnished no ground of supplementary right for defendant to erect them on the land of plaintiff, of whom it is the competitor, whether lawfully or not, in the selling and leasing of water power. Defendant has no right to such adjunct, or to what is of less moment, *adjutage. The Schuylkill Navigation Co.* v. *Moore, 2 Wharton, 477.*

Nor can this imaginary supplementary right derive any support from the merely individual view of Gary, A. J. (*Record, pp. 33, 34, fol. 63*), that the Circuit Judge found, as matter of fact, that defendant's right to erect a steam plant was merely incidental to and essential to the enjoyment of the use of the water power plant; for, *first*, he made no such finding; *second*, he made no finding of fact whatever on the subject; and, *third*, he simply, as mere matter of law, decided that by a proper construction of the contract, defendant had this supplementary right, and supported his construction by the logic before cited.

The construction put by the State Supreme Court on the con-

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tract and Act of 1892 is, for the purposes of this writ of error and case, to be taken by this Court as much a part of the said contract as if textually inserted therein, and to be accepted as conclusive, in judging whether it conforms to the Constitution of the United States. *Chicago, Milwaukee and St. Paul Railway Co.* v. *Minnesota, 134 U. S., 456; Ill. Cent. R. R. Co.* v. *Ill., 163 U. S., 142, 152; Mo. Pac. Railway* v. *Nebraska, 164 U. S., 446, 447; Lee* v. *Pillsbury, 105 U. S., 294; Leffingwell* v. *Warren, 2 Black, 603; State Bank of Ohio* v. *Knoop, 16 How., 391; Ins. Co.* v. *Treasurer, 11 Wall., 208, 209; Kaukanna Co.* v. *Green Bay and Miss. Canal, 142 U. S., 269; Chicago, St. Paul and Milwaukee R. R. Co.* v. *Minnesota, 146 U. S., 366; and authorities cited in Tucker's Argument in Spies* v. *Illinois, 123 U. S., 146.* That construction is, that this contract and Act justify and legalize the conduct of defendant, alleged in paragraphs 12 and 13 of the complaint, and do not conflict with § 10, Art. 1, nor Amendment 14, of the Constitution of the United States. Does it need argument to show that, in so far as this is concerned, the judgment of the State Supreme Court must be reversed?

Second Head.

Though the conclusion that the judgment of the State Supreme Court must be reversed, in so far as it relates to the matters decided, which are involved in and connected with this branch of the case, may not be so patent at first blush as it is in those involved in and connected with the first branch of the case; yet on examination it will be clearly found that the same result must be reached.

The basic difference under this head between the decision of the Court below and what plaintiff contends is the true view is this: The Court decides that under the contract of the State with the plaintiff and the proper construction of the Act of 1887, the exclusive right sold and conveyed to the plaintiff of leasing and selling the water power to be developed by the canal, is so limited and restrained by the provisions of that Act, imposing upon the plaintiff the duty to furnish the State with 500 horse power of water power, as that the right and power of the State *over* this 500 horse power of water power and *over* its use and disposal were absolute, unlimited and unrestricted, and that the State could dispose of and utilize it any way she pleased, and for any use and purpose she pleased; could divert it from use for the Penitentiary, and could assign and transfer it to a rival corporation of plaintiff for the private gain and profit of that corporation, as competitor with plaintiff in leasing and selling the water power developed by plaintiff's canal. Plaintiff contends that the provisions of the Act of 1887 imposing upon plaintiff this duty in no wise limit or restrict the exclusive right of plaintiff to lease and sell the water power to be developed by its canal, but merely impose upon plaintiff a duty to

furnish the State with this 500 horse power of water power *for the use of the Penitentiary, and for that use only*, without the right or power on the part of the State to divert it from the use of the Penitentiary, and lease or sell it to any one for any purpose; and that the State cannot divert it from the use of the Penitentiary to the use of a rival corporation, thus setting up a competitor of plaintiff in leasing and selling the water power to be developed by plaintiff's own canal, without impairing the obligation of the State's contract with plaintiff.

In limine, that by the provisions of the Act of 1887, this 500 horse power of water power to be furnished by the plaintiff to the State was to be furnished *for the use of the Penitentiary*, as plaintiff contends, is not only the true but was the universal construction, including that by defendant and the State, is shown in boldest relief by the terms of the description and recital of these provisions in the articles of agreement between the Board of Directors of the Penitentiary and the defendant, May 26, 1892, and the Act of December 24, 1892, ratifying and confirming the same; for in both of these both the State and defendant not casually admit, but articulately in terms assert, iterate and reiterate the fact that this 500 horse power of water was to be furnished to the State *for the use of the Penitentiary!!! Record, p. 16, fols. 30, 31, p. 18, fol. 35, 21 St., 94, 95.* It is the very refrain and chorus of the contract between the State and the defendant, and, as if to advertise and call attention to it by label, it is indelibly stamped upon it in the very title of the Act!!! Might not plaintiff successfully rest its case here? *Nonne cadit quæstio?* And with the information given by the very first reading of these articles of agreement and Act, as to what use the State purports and purposes to divert, and has diverted, and continues to divert, this 500 horse power of water power from the use of the Penitentiary, *nonne cadit altera quæstio*, as to this contract and Act impairing the obligation of the State's prior contract with the plaintiff? Assuming, for the sake of argument, if such an assumption could be for a moment allowed, that this is a valid contract between defendant and the State, would the State have the right to transfer the 100, the maximum horse power of water power reserved by defendant's contract for the use of the Penitentiary, to a rival corporation, thus enabling the latter to undersell defendant in selling and leasing water power of the canal, without violating its contract with defendant?

Before minutely considering the provisions of the Act imposing the duty of furnishing the 500 horse power of water power, glance a moment at plaintiff's rights.

Plaintiff is the owner, *inter alia*, of the canal, the lands held therewith, and of the franchise "to sell or lease the water power of the canal, subject to such rules and regulations as it shall prescribe." *A. A. 1887, § 21, 19 St., 1096.* Franchise, in England, is "a royal privilege, a branch of the King's prerogative, subsisting in the

hands of a subject." *Finch, 164.* In this country, the commonwealth stands in the place of the King, and has succeeded to all the prerogatives and franchises proper for a republican form of government. *Commonwealth* v. *Arrison, 15 Serg. & Rawle, 130.* It is in this country a special privilege conferred by government upon individuals, and which does not belong to the citizens generally as of common right. *Bank of Augusta* v. *Earle, 13 Pet., 595.* Privileges and immunities of a public nature which cannot legally be exercised without a legislative grant are franchises, although they never existed in the people or could be exercised by them in their political capacity. *Spencer, J., in People* v. *Utica Ins. Co., 15 Johns., 388.* They are particular privileges conferred upon individuals by grant from the government; incorporeal hereditaments, not only authorizing something to be done, but giving the owner the right of preventing all other persons from interfering with its exercise. *1 Lawrence & Rapalje's Law Dict., 543.*

They contain an implied covenant on the part of the government not to invade the rights vested. The government cannot resume them at pleasure, or do any act to impair the grant, without breach of the contract. An estate in such a franchise and an estate in land rest upon the same principle, being equally grants of a right or privilege for adequate consideration. If the creation of the franchise be not declared to be exclusive, yet it is necessarily implied in the grant that the government will not, either directly or indirectly, interfere with it so as to impair its value. Every such interference, whether it be by *the creation of a rival franchise* or otherwise, would be in violation or in fraud of the grant. All grants or franchises ought to be so construed as to give them due effect, *by excluding all contiguous competition*, which would be injurious and operate fraudulently on the grant. The common law contained principles applicable to this subject, dictated by sound judgment and enlightened morality. It declared all such invasions of franchises to be nuisances, and the party aggrieved had his remedy at law by an action on the case for disturbance, and in modern practice he usually resorts to chancery to stay the injurious interference by injunction. *3 Kent, 458-9.* The most valuable of modern franchises are the various kinds of *lawful, exclusive privileges or monopolies*, such as the exclusive right to supply cities and towns, given to gas and *water* companies and numerous other corporations, endowed with similar franchises, or with such others as more or less *exclude competition* by the very nature of the privileges bestowed; the right to exclude competition, being for its own benefit, can be relinquished only by the grantee, and cannot be taken away from it by State legislation, because such legislation impairs the obligation of a contract. *8 Amer. & Eng. Encyc. of Law, 598-9, 614; N. O. Gas Co.* v. *La. Lt. Co., 115 U. S., 650-673; Woodruff* v. *Trapnal, 10 How., 187; Gibbons* v. *Ogden, 9 Wheat., 74; Slaughter House Cases, 16 Wall., 65.* The doctrine of *Phyfe*

v. *Wardell*, *5 Paige*, *268*, and *Armon* v. *Alexander*, *10 Paige*, *571*, that even the good will of a lease which the landlord is in the habit of renewing is property, and rights growing out of it by contract or otherwise will be protected and enforced by a court of equity, is cited with approbation in *Davis* v. *Gray*, *16 Wall.*, *227*, *228*, which case goes on to say that the right to acquire and sell particular real estate is a franchise, and that the act of incorporation and land grant there were contracts and within the protection clause of the Federal Constitution. *16 Wall.*, *232*; *Campbell* v. *Hort*, *115 U. S.*, *628–630*. And so of the franchise here to lease and sell the water power, as well of the land which plaintiff purchased and had title for. The valuable privilege which conduced to the purchase. *State Bank of Ohio* v. *Knoop*, *16 How.*, *380*.

In order to determine whether the plaintiff's exclusive right to sell and lease the water power to be developed by its canal is in any manner affected, and, if so, in what manner, by the provisions of the Act of 1887 imposing upon the plaintiff the duty to furnish the State with 500 horse power of water power, all the provisions of the Act relative thereto must be examined and considered together, so as to make, if possible, a consistent whole, without conflict between any of the provisions. These provisions are in these sections:

§ 2, where, among the enumerated purposes for which the Board of Trustees of the Columbia Canal are authorized, empowered and directed to improve and develop the canal, is the one stated in these words, "*for providing an adequate water power for the use of the Penitentiary.*"

§ 7. "The Board of Trustees shall * * * furnish to the State, *free of charge*, on the line of the canal, 500 horse power of water power; to Sullivan Fenner or assigns, 500 horse power of water power, under his contract with the Canal Commission; and to furnish the city of Columbia 500 horse power of water power, at any point, between the source of the canal and Gervais street, the city may select. * * * *Provided*, That the right of the State to the free use of the said 500 horse power shall be absolute; and any mortgage, assignment or other transfer of the said canal by the said Board of Trustees or their assigns shall always be subject to this right." [This section was deemed necessary, because, by §§ *9*, *10 et seq.* of the Act, there was set on foot a financial scheme by which the Board of Trustees were empowered to mortgage the canal and lands held therewith, to secure the payment of bonds to the amount of $200,000 and interest, which the Trustees were therein authorized to issue.]

§ 21. "The Board of Trustees may sell or lease the water power of the canal, subject to such rules and regulations as it shall prescribe, having first provided for the State with 500 horse power of water power *at the Penitentiary*, and 500 horse power of water

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power for Sullivan Fenner or his assigns, and 500 horse power of water power for the city of Columbia."

By § 2 of an Act of December 24, 1890 (*20 St., 968*), to amend this Act of 1887, it was so amended as that the Board of Trustees should have full power and authority, before the canal had been fully developed and completed and turned over to the city of Columbia, to sell, alienate and transfer the same and all its appurtenances, the lands held therewith, *and all the rights and franchises* conferred by this Act on said Board of Trustees, to any person or corporation, subject, however, to all the duties and liabilities imposed thereby.

Under this Act, the canal property was sold and conveyed to plaintiff in 1892. Can the words of the Act of 1887, imposing upon the plaintiff the duty to furnish the State with 500 horse power of water power, by any recognized principle of interpretation, any approved canon of construction, be so tortured as in any manner to limit or restrict the exclusive right of plaintiff, purchased by it, to sell and lease the water power to be developed by its canal? Can they be expanded into any obligation of greater import than that the vendee and owner of the canal property shall furnish to the State 500 horse power of water power, *free of charge, on the line of the canal, at the Penitentiary, for the use of the Penitentiary?* In the consideration of this question, attention is specially called to these fundamental rules in the construction of contracts, "that the Courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of all the same light which the parties possessed when the contract was made." *Merriam* v. *U. S., 107 U. S., 441.* "The real character of a promise does not depend altogether upon the form of expression, but largely on the situation of the parties, and the question always is, what the parties mutually understood by the language." *Davis* v. *Patrick, 141 U. S., 689.* "The Court is not only at liberty but required to examine the entire contract and the circumstances under which it was signed. The intent of the parties must be gathered from the character of the conveyance, *the nature and situation of the property conveyed, and of the property excepted, and the purpose of such exception.*" *Rock Island Railway* v. *Rio Grande Railroad, 143 U. S., 614.*

"The language written is read and interpreted in the light of the circumstances which prompted it, and to which it always tacitly refers." *State* v. *Smith, 12 Rich. So. Ca., 442.*

It is also an elementary rule, in the construction of statutes, that "all Acts *in pari materia* are to be taken together as if they were one law" (*Lord Mansfield, in The Earl of Ailesbury* v. *Pattison, 1 Douglas, 30; Rex.* v. *Loxdale, 1 Burr, 445*), "because they are considered as having one object in view, and as acting upon one system; though some of the statutes may have expired. The object of the rule is to ascertain and carry into effect the intention;

and it is to be inferred that a code of statutes referring to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions." *3 Kent, 463.*

It was the hope, the dream, of the State to have the canal pass from the State's hands into such hands as would cause large manufacturing industries to spring into existence on its banks, whose machinery should be worked by the water power developed by it, and that she herself should be furnished from it by the owner of the canal free of charge, with a supply of water power for the use of the Penitentiary, which was in part the eastern boundary of the canal, adequate to meet the demands of the ordinary operations of the Penitentiary and of the other industries conducted and carried on within its walls. This is historical, and is traceable through all the canal legislation which is permeated by it. All the previous efforts of the State in this regard had resulted in the bitter ashes of disappointment. The large fruitage which has now come is through the plaintiff's purchase.

In the "Act to authorize the sale of the Columbia Canal," December 21, 1865, *13 St., 310*, the first act passed for that purpose, there is no reservation for the use of the Penitentiary, for there was then no Penitentiary; but in the "Act to provide for the establishment of a Penitentiary," September 21, 1866, *13 Stat., 393*, § *2*, it is made the duty of the Commissioners of the Penitentiary "to select and procure a proper site, if practicable, *where water power may be made available for manufacturing purposes within the enclosure* [in accordance with which the site of the Penitentiary was located on the eastern bank of the canal], on which to erect suitable penitentiary buildings, with sufficient space to enlarge and improve the same from time to time as may be necessary." § 4. "The labor of the convicts to be directed to such available branches of industry as will best contribute to the support of the institution." And in the "Act to amend an Act entitled 'An Act to authorize the sale of the Columbia Canal, ratified the 21st day of December, 1865,'" approved December 19, 1866, *13 Stat., 408*, § *2*, the third section of the former Act, was so amended as to read: "That the Commissioners already appointed [to sell and convey the canal] be authorized to sell at public or private sale, at their discretion: *Provided*, That in any sale that may be made by said Commissioners *there be a reservation to the State of water power sufficient for the purposes of the State Penitentiary for all time, free of charge.*" In the Act to authorize the sale of the Columbia Canal, September 21, 1868, *14 Stat., 84*, § *4*, are the same words of reservation of water power of the canal for the purposes of the State Penitentiary. § 4. "The Commissioners hereby appointed are authorized to sell said property at public or private sale, at their discretion: *Provided*, That in any sale they may make, *there shall be a reservation to the State of water power sufficient for the purposes of the State Peni-*

tentiary for all time, free of charge." This Act, though amended twice in other particulars, was untouched in this. Act February 8, 1869, *14 St., 177;* Act February 28, 1870, *14 St., 367.*

Under the Act of September 21, 1868, there was a sale and conveyance of the canal property to the purchaser, Samuel A. Pearce, Jr., as trustee for Wm. Sprague, January 7, 1869; this reservation to the State of water power sufficient for the purposes of the State Penitentiary for all time, free of charge, being inserted in the conveyance. For default made in the conditions imposed in the deed of conveyance, the title to the premises conveyed by the deed reverted to the State. A. A. June 7, 1877, *16 St., 316;* A. A. February 14, 1878, *16 St., 360.*

There was next passed "An Act to authorize and empower the appointment of a Commission to control and direct the development and disposal of the property of the State known as the Columbia Canal and its appurtenances," approved March 12, 1878. *16 St., 445.* § 4 provides that "In all grants that may be made, *sufficient power shall be reserved to the State for the use of the Penitentiary and the city of Columbia.*"

There was then next passed "An Act to authorize the Canal Commission to enter into a contract for the sale of the canal to David M. Thompson and Augustus F. Neagle," approved December 23, 1879, by § 9 of which Thompson and Neagle were to give to the State, between the Columbia Water Works and Senate street, 1,500 horse power of water power, to be used or disposed of in such manner and on such terms as the State may direct. The Penitentiary is within this area, and it is evident, from the legislation *ante* and *post*, that of this 1,500 horse power of water power, 500 was for the city of Columbia, 500 for Sullivan Fenner under his contract with the Canal Commission, and 500 for the use of the Penitentiary. No deed of conveyance of the canal property was ever made to Thompson and Neagle, and they executed a release of all their rights to the State under this Act and the contract made thereunder.

There was then next passed "An Act to authorize the Canal Commission to transfer and deliver to the Board of Directors of the South Carolina Penitentiary the property known as the Columbia Canal, with the lands held therewith, and its appurtenances, and to develop the same," approved February 8, 1882. *17 St., 855.*

§ 2 is: "That the said Board of Directors are hereby authorized and directed, on behalf of the State, to take into their possession the said property, with its appurtenances; *and for the purpose of providing an adequate water power for the use of the Penitentiary* and for the other purposes to be hereinafter named, they are authorized, empowered and directed to improve and develop the same."

These other purposes are set out in § 6: "That the said Board of Directors are authorized to furnish to the city of Columbia, for the

purpose of operating its water works and for other purposes, 500 horse power of water power; and to Sullivan Fenner, under his contract with the Canal Commission, 500 horse power of water power; and *after reserving for the use of the Penitentiary a power sufficient to meet the demands of its ordinary operations and other industries conducted and carried on within its walls*, they are further authorized, with the Comptroller General on behalf of the State, to lease to other persons or corporations water power." Read now the provisions of the Act of 1887, before cited, and if there had been doubt before as to its interpretation in this regard, for which plaintiff claims there is no legitimate ground, can there be a lingering doubt in the radiance which these lights throw around it, that the 500 horse power of water power to be furnished to the State was for the use of the Penitentiary, and for that use alone? The subject-matter and all the surrounding circumstances, the situation of the parties, their mutual understanding, the universal construction, the nature and situation of the property conveyed, of the duty imposed upon the owner of the canal, and the sole purpose for which it could have been imposed, the *situs* of the Penitentiary with reference to the canal, the whole continuous current of the Legislature, have a convergent force, which is irresistible, as to the sole use to which the State was bound, morally and legally, to apply this 500 horse power of water power, if there be any potency whatever either in good faith or the constitutional inhibition in the Federal organic law against State legislation impairing the obligation of contracts. The amount of this power—500 horse power—was that fixed by the State as the maximum required to meet the demands of the ordinary operations of the Penitentiary and the State industries conducted and carried on within its walls, these words stamped in by the canal legislation, showing with no uncertain sound what was meant by *for the use of the Penitentiary*. This amount, with the 500 for the city of Columbia and the 500 for Sullivan Fenner, making up the 1,500 in the Thompson and Neagle Act. The power of the State, the Board of Directors of the Penitentiary and of the Board of Trustees of the Columbia Canal to lease and sell water power of the canal had been bought by, conveyed to and vested in the plaintiff, if money can buy a franchise and solemn deeds can convey it. Great stress is laid in the decision below on the use of the word *absolute*. And it is commented on, *con spirito*, as much as if the Act by this expression had repealed all the prior legislative expressions of the will of the State as to what use this water power was to be devoted, and had in terms nullified the expressions in §§ 21 and 21 that it was to be furnished at the Penitentiary for the use of the Penitentiary. At the time of the passage of the amendatory act of December 24, 1890, authorizing the sale of the canal and all its appurtenances, the lands held therewith, and *all the rights and franchises conferred by the Act of 1887* on the Board of Trustees of the Columbia Canal,

it never entered the legislative mind that, under the guise of requiring 500 horse power of water power to be furnished by the purchaser of this property as the amount required for the ordinary operations of the Penitentiary and the State industries conducted and carried on by the convicts within its walls, it was reserving to itself the right and power to transfer this water power from this use to supply the stock in trade of a rival corporation, whom it would thus make a successful competitor of the purchaser it was tempting by the exclusiveness of the franchise—the purchaser the object of whose corporate existence and of whose investment in the purchase would be, *pro tanto*, alike destroyed. The legislative conscience would have shrunk back with recoil from such a proposition. With what force and truth is it said in *Mobile and Ohio R. R. Co.* v. *Tennessee*, *153 U. S., 502:*

"In the construction of the statutory laws of a State, it is frequently necessary to recur to the history and situation of the country, in order to ascertain the reason as well as the meaning of many of the provisions in them. *Preston* v. *Browder*, *1 Wheat, 120; U. S.* v. *Union Pac. R. R.*, *91 U. S., 79, 80, 81; Winona and St. P. R. R.* v. *Barney*, *113 U. S., 61.* Legislative contracts especially should be read *in the light of the public policy entertained and the purposes sought to be accomplished at the time they were made*, rather than at a later period, when different ideas and different theories may prevail. There is always a tendency to construe statutes in the light they appear when the construction is given. It is easy to be wise after we see the results of experience. But in endeavoring to ascertain what the *Congress of* 1862 [Legislature of 1887, 1890] intended, we must as far as possible place ourselves in the light that Congress [the South Carolina Legislature] then enjoyed, look at things as they appeared to it, and discover its purpose from the language used in connection with the attendant circumstances." Plaintiff contends that its construction is not only the natural and rational one, but carries out precisely the public policy entertained and the purposes sought to be accomplished at the time it was made. Further, that it is the construction which not only fitly follows the *animus* and intent of the preceding legislation, and carries out the purposes of the State, but the one which, while making a consistent whole of the act, gives its proper force and effect to all the provisions of the Act, including that in which the word of imputed magic, *absolute*, is used. "The right of the State shall be absolute." But what right of the State? Right of the State to what? The Act answers: "The right of the State to the *free* use of the *said* 500 horse power." Free—*i. e.*, free of charge. The opening clause of the section puts this beyond peradventure. "The Board of Trustees shall * * furnish to the State *free of charge*, on the line of the canal, 500 horse power of water power"—*said* 500 horse power, *i. e.*, the 500 horse power of water power already mentioned, which the Board of Trustees shall furnish to the State, § 7, for

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the use of the Penitentiary, thus providing an adequate water power for the use of the Penitentiary, § 2, on the line of the canal, § 7, and later still more definitely stated as to the *locus*, to wit: at the Penitentiary, which had its site on the eastern bank of the canal, designedly, in order from its juxtaposition to the canal, the more readily to receive from it an adequate water power for its use. To the sense in which the word absolute is here used the rule applies in full force, *noscitur a sociis;* the word free—*i. e.*, free of charge—and the words immediately following absolute—"and *any mortgage*, assignment or other transfer of the said canal by the said Board of Trustees or their assigns shall always be subject to this right," *i. e.*, the right to be furnished by the owner of the canal, whatever might be the mutations in its ownership and whatever liens might be placed upon it by any of its successive owners, with what was deemed an adequate water power (500 horse power) for the use of the Penitentiary, should always be unaffected thereby. This may have been unnecessary to effect this object, the other terms of the Act perhaps sufficiently providing for it; but as the State was about parting with the ownership and possession of the canal property, and its darling and praiseworthy object, the getting from the canal an adequate water power for the use of the Penitentiary, being possibly menaced by the large mortgage authorized to be put upon the canal property, it was deemed best, *ex abundanti cautela*, to put the water power for the use of the Penitentiary beyond peradventure. "This extent it hath and no more." To give it more, such as is given by the Court below, is to inject into the word a meaning which, as used here, it does not import, and which the context shows to be equally far-fetched and fallacious—mayhap ingenious, certainly not ingenuous. It is not a right *over* this water power, not a right to dispose of it in any manner the State pleased, but a right to it for the use of the Penitentiary, and that use alone, defined not only by the whole canal legislation, but expressed both in spirit and letter in the Act itself.

N. B.—Great additional force is given to plaintiff's construction by the notable fact, that while stringent obligation is put upon the successive owners of the canal that the duty to furnish this water power to the State for the use of the Penitentiary is not to be affected by any mutations in its ownership, there is no provision made for its continuance in the event of the Penitentiary ceasing to exist, or the Penitentiary *situs* and buildings passing into other hands, or for this right passing into other hands.

It is not seen how the view of Gary, A. J., can prevail, that by the contract between the plaintiff and the State, the use of the word "absolute" was for the purpose of creating a right in the State to this 500 horse power, separable and distinct from the ownership in other property, and not dependent upon any particular lands to which it may be appurtenant, and that it was a right of *profit a prendre*, without ignoring the terms of the contract, both their

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letter and spirit, the well-settled principles of construction of contracts and statutes above recited, important and well settled fundamental law, the whole history of the canal legislation, and fixing upon the State that it has held out false lures to the plaintiff, an innocent purchaser. If A, a private person or corporation, had been the owner of the canal property and of a manufacturing establishment located where the Penitentiary is, and had, for value, vested in the plaintiff the same estate, property, rights and franchises which have been vested in it by the Acts of Assembly of 1887 and 1890, and the conveyances thereunder, and by the contract there had been a duty imposed on the *plaintiff* and his successors to furnish A with 500 horse power of water power at the manufacturing establishment, for the use of the manufacturing establishment, the absolute right to the free use of which was reserved by A, and any mortgage, assignment or transfer of the canal should always be subject to this right—what would be the relative rights and position of A and the plaintiff? By the weight of authority, the right of A would have been that of owner of a dominant tenement, a right appurtenant annexed to the manufacturing establishment, and the duty imposed upon plaintiff would have been a servitude of the canal property as servient tenement to the manufacturing establishment, the dominant tenement. The right of A, as owner of the dominant tenement, would be appurtenant, attached to, and an incident to the land, and would pass with it, whether the land be for a term of years, for life or in fee, and could not be separated from or transferred independent of it. *Kollee* v. *Knecht*, *99 Ill.*, *366*; *Wagner* v. *Hanna*, *38 Cal.*, *116*, *117*. A covenant running with the land; covenants running with incorporeal as well as with corporeal hereditaments. *Van Rensselaer* v. *Reed*, *26 N. Y.*, *563*. No one can have such right but he who has the realty to which it is appendant.

If the right of A would not be that of owner of the dominant tenement, a right appurtenant and annexed to the manufacturing establishment, then it would be a right in gross, personal to the owner, dying with the possessor, incapable of alienation, not transferrable, and cannot be made so. In neither event could the assignee of this have the right to take anything, or have the right to this duty being performed by plaintiff for such assignee's private gain and profit by diversion from the use of the manufacturing establishment. *Peck* v. *Conway*, *119 Mass.*, *546–9*; *Ackroyd* v. *Smith*, *10 Common Bench*, *1 J. Scott*, *187*, *70 E. C. L.*; *Savage* v. *Mason*, *3 Cushing*, *505*; *Spensley* v. *Valentine*, *34 Wisc.*, *160*; *Noonan* v. *Orton*, *4 Wisc.*, *535*; *Keppel* v. *Bailey*, *2 M. & K.*, *537–8*; *7 Eng. Ch.* The doctrine of *Ackroyd* v. *Smith* is the settled law of South Carolina, peculiarly strong in favor of plaintiff's contention in this regard. *Whaley* v. *Stevens*, *21 S. C.*, *237*, *27 S. C.*, *560*; *Fisher* v. *Fair*, *34 S. C.*, *208*; *Morse* v. *Garner*, *1 Strob.*, *514*.

Assignee of the rent reserved out of the original estate of the grantor, in an action against a person to whose use the premises were granted subject to the rent, has neither privity of contract nor privity of estate in respect to the covenant, and the covenant must be regarded as a covenant in gross. Lord Ellenborough said he failed to see how the analogy, as it regards covenants which run with the land, was to be applied, unless it could be shown that it was land, as it might as well have been applied to any covenant respecting a matter merely personal; and he inclined to view the language ascribed to Lord Holt, in *12 Mod., 170* (*Brewster* v. *Kidgill*), "that the assignee of the rent should have covenant against the grantor, because it is a covenant annexed to the thing granted," as extra-judicial. But, putting aside that *dictum* of Lord Hoet with respect to a grant by a tenant in fee of a rent charge out of lands, he found no authority to warrant the position that in the case of a conveyance in fee to certain uses, one of which was that the grantor should receive a rent, a covenant to pay the rent would run with it to an assignee thereof. *Milnes* v. *Branch, 5 M. & S., 417; 2 Rob. Pr., 80–83, end of § 8, 85, end of § 95*, and authorities there cited, among them *Ackroyd* v. *Smith, 70 E. C. L., 187; Morse* v. *Garner, 1 Strob., 519.*

The assignee of a collateral covenant (a covenant beneficial to the lessor, without regard to his continuing the owner of the estate,) cannot sue upon it. It does not pass to him. *Vivyan* v. *Arthur's Administratrix, 1 Barn. & Cross., 410; 8 E. C. L., 115; Best, J., in Vernon* v. *Smitt, 5 Barn. & Ald., 1; 7 E. C. L., 7; 2 Rob. Pr., 92.*

The right of action of a lessor, for a breach of covenant by his lessee, cannot be extended to his assignee, without his being named in the covenant, when the subjeet-matter of it does not relate to a thing *in esse* at the time of the demise. The water power was not developed, was not *in esse* at the passage of the Act of 1887. *Grey* v. *Culbertson, 2 Chitty, 482; 18 E. C. L., 397; 4 Doug., 351; 26 E. C. L., 398; Doughty* v. *Bowman, 11 Adol. & Ell., N. S., 448; 63 E. C. L., 447; Spencer's Case, 4 Co., 16a, and authorities cited; 2 Rob. Pr., 83, 92, 93.*

That the right of the State is not a right of *profit a prendre*, but an easement. See *Godard on Easements, p. 771; Gould on Waters, §§ 299, 310; Angell on Water Courses, §§ 142, 143, 7th ed.; Manning* v. *Wasdall, 2 Harr. & Woll., 441; 3 Kent, 427; Hill* v. *Lord, 48 Me., 49; Post* v. *Pearsall, 22 Wend., 433; Prince* v. *Heator, 70 N. Y.. 421; Ritzer* v. *Parker, 8 Cush., 147; Huntingdon* v. *Asher. 96 N. Y., 505.* The right to this water power comes within the very limitations cited by Gary, A. J., from *Hall* v. *City of Ionia, 38 Mich., 423*, making it dependent on lands to which it is appurtenant, and not having a separate and intrinsic importance; for the facts confine it both to a special place (the Penitentiary) and to a specified purpose (the use of the Penitentiary), a right

which the State cannot sell or lease. *Rochdale Canal Co.* v. *Radcliffe, 18 Adol. & Ell., N. S., 307–311; 83 E. C. L.*

But the case at bar is an infinitely stronger case for plaintiff than in the case supposed of A, a private person or corporation, the owner of the canal property and of a manufacturing establishment located where the Penitentiary is, conveying to plaintiff what has been vested in it by the Acts of Assembly and the conveyances thereunder; for the Court takes judicial cognizance and is informed by the Acts of Assembly quoted that the Penitentiary was established for utilizing convict labor in purposes of the State, *qua* State, and that this water power was to be specially devoted to its ordinary operations and industries conducted and carried on within its walls. This right was not assignable or transferable. "Rights arising out of contract cannot be transferred if they involve a relation of personal confidence, and the party conferring those rights must have intended them to be exercised by him only in whom he actually confided." *Arkansas Smelting Co.* v. *Belden Co., 127 U. S., 388; Pollock on Contracts, 4th ed., 425. A fortiori*, where these rights are to be exercised only at a specified place, and for a specified purpose, a State purpose of public utility. *Strong* v. *Benedict, 5 Conn., 219; Turletott* v. *Phelps, 4 Gray, 374; Sibley* v. *Hoar, 4 Gray, 222; Garland* v. *Hodson, 46 Me., 515; Washabaugh* v. *Oyster, 6 Pa. St., 497; Deshon* v. *Porter, 28 Me., 289; Stockbridge Iron Co.* v. *Hudson Iron Co., 107 Mass., 309, 324, 291.* "Call this right an easement or what you will," to use the language of the Circuit decree, the State cannot by any law she may pass divert this water power from the specified public purpose to which she advertised purchasers of the canal that it was to be devoted and used for, to the use, gain and profit of a private rival corporation, to assist in competing with plaintiff in the selling and leasing of water power developed by plaintiff's canal, without impairing the obligation of the contract made by plaintiff with the State, and depriving plaintiff, *pro tanto*, of the fruits of its purchase without due process of law.

Besides all this, the restriction to the *locus*, the Penitentiary, and the restriction to the purpose, the use of the Penitentiary, as matter of fact, the State had let fall the management of the canal, discontinued its appropriations, and did not go into the business of leasing water power and manufacturing for gain, and as matter of law could not. "The State has not the right to engage in any trade or business for gain." *Mauldin* v. *Greenville, 33 S. C., 1.* What the State cannot do directly, it cannot do indirectly. "*Qui facit per alium, facit per se.*"

With respect to what is said by Gary, A. J., individually (*Record, p. 28, fol. 52*), based upon his own views expressed in *Heyward* v. *Farmers' Mining Co., 19 S. E. R., 963, 42 S. C., 138*, as to the complaint alleging two causes of action, it need only be said that it is perfectly competent, and not at all unusual, for plaintiff to

manifestly designed to be made an appurtenance to an existing structure for a particular purpose to be accomplished by the

allege that trespasses and injuries have been continuously committed by defendant upon his rights and property, and that trespasses and injuries are threatened and about to be committed by defendant upon his rights and property, and to pray for injunction against the latter and compensatory damages for the former in one and the same complaint. *Tyler* v. *Maguire, 17 Wall., 284, 285;* and in South Carolina, both in the *ante-Code* practice, *Bird* v. *R. R. Co., 8 Rich. Eq., 46; 64 American Decisions, 739; Lamar* v. *R. R. Co., 10 S. C.. 480,* and in the practice under the Code, *Busby* v. *Mitchell, 29 S. C., 452.*

The individual view expressed by Gary, A. J. (*Record, p. 30, fol. 56*), as to the State being an indispensable party, in so far as equitable relief is sought, is on the same line with the views expressed by him in *Butler* v. *Ellerbe, 44 So. Ca., 266,* and which were his solely, and not concurred in, being only a dissenting opinion in so far as this subject is at all concerned. The sentence quoted by him to sustain his view, from *In re Ayres, 123 U. S., 500,* expressly says that the very ground on which *Osborn* v. *Bank U. S., 9 Wheat., 578,* was adjudged not to be a suit against the State, *and not to be one in which the State was a necessary party,* was that defendants, personally and individually, were wrongdoers, against whom the complainants had a clear right of action for the recovery of the property taken or its value, and that, therefore, it was a case in which no other parties were necessary. This is precisely the case at bar. If it should be said that is true only at law and not in equity where injunction is sought, as seems to be the individual view of Gary, A. J., full answer thereto is made by the very case of *Osborn* v. *Bank U. S.,* and the subsequent cases decided by this Court on that subject, all of which have in this regard tracked that case. It is only necessary to read the sentence immediately preceding the one extracted by the Associate Justice: "One of the principal questions in the case was whether equity had jurisdiction to restrain the commission of such a mere trespass, a jurisdiction which was upheld upon the circumstances and nature of the case, and which has been repeatedly exercised since." And it was there decided, in the strongest and most emphatic manner, that the State was not a necessary party. This case, too, is not one of mere trespass, but of continuous and dangerous trespasses, threatening irremediable injury and the safety of plaintiff's canal. That the State is not an indispensable party in this action is *res judicata* in this case, and *Osborn* v. *Bank U. S.* is the highest and most conclusive authority that this adjudication is correct. It is there said: "It is admitted that the privilege of the principal is not communicated to the agent, for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury." [Here Gary, A. J., after a process of reasoning and citation of authority, arrives at the conclusion that the State is not a necessary party in so far as the *legal,* as distinguished

Structure" Knotts v Hydrick 12 Ru

from the *equitable*, features of the action are concerned.] "It being admitted, then, that the agent is not privileged by his connection with the principal, that he is responsible for his own act to the full extent of the injury, why should not the preventive power of the Court also be applied to him? Why may it not restrain him from the commission of a wrong which it would punish him for committing? We put out of view the character of the principal as a sovereign State, because that is made as a distinct point, and consider the question singly as respects the want of parties. Now, if the party before the Court would be responsible for the whole injury, why may he be not restrained from its commission, if no other party can be brought before the Court?" *9 Wheaton, 343.* Can any authority be stronger, clearer or more directly applicable? "The interference of the Court in this class of cases, the protection of parties in the enjoyment of a franchise, has most frequently been to restrain a person from violating an exclusive franchise by participating in it." *9 Wheat., 341.* In that case, the questions arising from "the character of the principal as a sovereign State" were elaborately discussed and clearly decided, and its decision that *in consimili casu*, such as in the case at bar, applications for the equitable relief of the Court by injunction against the wrongs and trespasses of individual wrongdoers, the State was not an indispensable party, has been uniformly followed. This is abundantly shown in *Poindexter* v. *Greenhow, 114 U. S., 293; Allen* v. *B. & O. R. R., 114 U. S., 311; Pennoyer* v. *McConnaughty, 140 U. S., 10–18; In re Tyler, 149 U. S., 490.* And this principle is as strongly admitted in the cases decided where the State has been held to be a necessary party as in those cases where it has been held not to be—*e. g.*, the cases relied on by the Associate Justice, *Hagood* v. *Southern, 117 U. S., 70*, where the judgment below was a judicial proceeding against the State itself—*117 U. S., 69; Cunningham* v. *Macon and Brunswick R. R. Co., 109 U. S., 452*, where the effort was to foreclose a mortgage upon and sell property to which the State had the legal title, and of which it was in actual possession—*109 U. S., 457;* and *In re Ayres, 123 U. S., 500.*

In *Briggs* v. *Life Boats, 11 Allen, 161–165*, the life boats against which it was attempted to enforce a lien were owned, held by and in the possession of the United States for public uses, and as instruments for the execution of their sovereign and constitutional powers. None of this class of cases have any application to or bearing on the case at bar adverse to defendant. That, independent of the special decisions of this Court covering the very point in question, the equity rule as to parties invoked, can have no application here, would seem to be patent from the highest authority. *Lord Eldon, in Attorney General* v. *Jackson, 11 Vesey, 367*, and in *Adair v. New River Company, 11 Vesey, 444*, and in *Cockburn* v. *Thompson, 16 Ves., 325; Sir Thomas Plumer, Master of the Rolls, in Menx* v. *Maltby, 2 Swanston, 295–300; Lord Col-*

tenham in Wallworth v. *Holt*, *4 Mylne & Craig*, *635*, *636*; *Wiser* v. *Blatchly*, *1 Johns. Ch.*, *437*; *Ex parte Martin*, *58 Am. Dec.*, *321*; *Bank* v. *Hastings*, *Mich. St.*, *1 Doug.*, *225*; *Story Eq. Pl.*, §§ *77*, *78*, *note 2*, § *135a*. By the Acts of Assembly and the conveyances thereunder, the plaintiff has title to and possession of the *res*, the whole of the water that flows down the canal, with only the duty imposed by its contract to furnish 500 horse power of water power for a specific use at a designated place. The position that the State is an indispensable party in so far as equitable relief is concerned, when stripped of artificial garb, is, that because defendant bases its justification for torts threatened and about to be committed on plaintiff's rights and property, involving irremediable injury thereto, on authority from a third person, *ergo*, that third person is an indispensable party to test the rights of plaintiff for injunction against those torts; and until such third person impossible to be made a party is made a party, plaintiff can not have a hearing of its plaint. The law throws no such transferred or transferable protection and shield around wrongdoers, and it makes no difference who that third person is. It must be remembered that though plaintiff succeeds, the State still has its 500 horse power of water power, its only right in the premises. It is not unworthy of note that this objection was not interposed until the case had been some time on trial, and then only orally, and that the South Carolina Code is express that a defence of defect of parties defendant must be interposed in the pleadings by demurrer or answer, and if defendant does not thus make it, such defence is waived. *So. Ca. Code*, §§ *165*, *166*, *168*, *169*. *Ita lex scripta est*, and *ita lex judicata est*, without distinction as to whether *legal* or *equitable* relief is sought. Of the former class, *Ross* v. *Linder*, *12 S. C.*, *593*; *Bowden & Earle* v. *Winsmith*, *11 S. C.*, *441*; *Commercial Insurance and Banking Company* v. *Turner*, *8 So. Ca.*, *111*; *Liberian &c. Company* v. *Rodgers*, *21 S. C.*, *33*; of the latter class, see *Featherston* v. *Norris*, *7 S. C.*, *484*, *485*; *Evans* v. *McLucas*, *12 S. C.*, *61*; *Daniels* v. *Moses*, *12 S. C.*, *137*. Plaintiff relies on the strength of these positions and the authorities sustaining them for a reversal of the judgment of the State Court on the matters embraced in and connected with this head with the same confidence it does for a reversal thereof on the matters embraced in and connected with the first head.

With full consciousness of the strength of these positions, defendant in error sought to elude the reversal of the judgment of the Court below, and moved this Court to dismiss the writ of error for want of jurisdiction in this Court, on the ground that no Federal question was involved in the judgment and decision of the State Court. The Record and this Brief, plaintiff respectfully submits, show most conclusively that, with the single exception of deciding in favor of plaintiff, that the plaintiff was the owner in fee simple of the *locus in quo*, a matter now *res judicata* and no longer in contest,

the judgment and decision of the State Court were, in truth, law and fact, the decision of Federal questions and nothing else, and that their decision was necessary to the determination of the cause. As plaintiff's view of *this question* has already been presented, somewhat elaborately and at length, and it is thought fatally to defendant's motion, plaintiff asks that the printed argument submitted by it at the last term *contra* the motion to dismiss be taken as part of this argument. Plaintiff can see nothing *as to the matters* involved in and connected with the first or second heads of this Brief, or with defendant's motion to dismiss the writ of error for want of jurisdiction, which can debar plaintiff from the full relief sought from this Court. "By the very terms of the statute, *14 St. U. S., 385, Feb. 6, 1867*, when the Supreme Court is of opinion that the question of Federal law is of such relative importance to the whole case that it should control the final judgment, that Court is authorized to render such process and enforce it by its own process." *Murdock* v. *Memphis, 20 Wall., 632.* In this cause the questions are exclusively of Federal law. "When this Court has once acquired jurisdiction, it may send its process in the enforcement of its judgment to the appellate Court of the State, or to the inferior Court whose judgment is reversed." *Williams* v. *Bruffy, 102 U. S., 356.* In this case, this Court, by its judgment, can grant the injunction sought by plaintiff and adjudge the assessment by the State Circuit Court of such damages as have been done plaintiff in the premises, and send its process directly to that Court.

LEROY F. YOUMANS,
For Plaintiff in Error.

AN ACT TO INCORPORATE THE BOARD OF TRUSTEES OF THE COLUMBIA CANAL, TO TRANSFER TO THE SAID BOARD THE COLUMBIA CANAL WITH THE LANDS NOW HELD THEREWITH AND ITS APPURTENANCES, AND TO DEVELOP THE SAME.

SEC. 1.—Canal and lands adjacent released to Trustees. Forfeiture.
SEC. 2.—Trustees to take possession and develop.
SEC. 3.—Dam line and size of Canal, banks, &c. Fish ways.
SEC 4.—Right of way.
SEC. 5.—Open for navigation. Right of State.
SEC. 6.—Bridges over Canal.
SEC. 7.—When to be completed. Horse power to State, city and Fenner.
SEC. 8.—Use of convict labor.
SEC. 9.—Trustees authorized to borrow $200,000.
SEC. 10.—Mortgage of Canal and Lands.
SEC. 11.—Description of bonds and coupons. City guarantee.
SEC. 12.—Registry. Sale by Trustees. Limit of price.
SEC. 13.—What to be endorsed on bonds and expressed on their face.
SEC. 14.—Registry of bonds sold. Annual report.
SEC. 15.—Penalty for fraudulent conduct.
SEC. 16.—Power to purchase and lease lands. Rental of power.
SEC. 17.—Exemption from taxation.
SEC. 18.—Trustees to pay interest after 1893. Sinking fund. Transfer to city.

SEC. 19.—To secure land before extending South of Gervais street.
SEC. 20.—Trustees, number, term of office and election.
SEC. 21.—Incorporation. Officers. Sale or lease of water power.
SEC. 22.—Vacancies.
SEC. 23.—Transfer of property to city.
SEC. 24.—Duration of Act. When to take effect.

SECTION 1. *Be it enacoed* by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the Board of Directors of the South Carolina Penitentiary are hereby authorized, empowered and required to transfer, assign and release to the Board of Trustees of the Columbia Canal, hereinafter created and provided for the property known as the Columbia Canal, together with the lands now held therewith, acquired under the Acts of the General Assembly of this State with reference thereto or otherwise, all and singular the rights, members and appurtenances thereto belonging; and upon such transfer, assignment and release all the right, title and interest of the State of South Carolina in and to the said Columbia Canal and the lands now held therewith, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, together with all the appurtenances thereunto belonging, shall vest in the said Board of Trustees for the use and benefit of the city of Columbia, for the purposes hereinafter in this Act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the said Board of Trustees and their assigns: *Provided*, That should the said canal not be completed to Gervais street within seven years from the passage of this Act all the rights, powers and privileges guaranteed by this Act shall cease, and the said property shall revert to the State.

SEC. 2. That the said Board of Trustees are hereby authorized and directed, for the development of the said canal, to take into their possession the said property with all its appurtenances; and for the purpose of navigation, for providing an adequate water power for the use of the Penitentiary and for other purposes herein named, they are hereby authorized, empowered and directed to improve and develop the same.

SEC. 3. That in order to improve and develop the power of the said canal for navigation, to furnish the city of Columbia with an adequate supply of water and other hydraulic purposes, they are authorized to construct a dam across Broad River at, above or below the head of the present canal, as, by survey already made or hereafter to be made, may be deemed advisable for the development of the said water power; and in locating and constructing the said dam, they shall have the right to raise the water in Broad River to such a height as will give a head and fall of thirty-seven feet at the South side of Gervais street at mean low water; with the right to build all necessary banks, abutments and other structures on both sides of said river as may be required to complete the said

dam; and the right is hereby given to widen and deepen the said canal throughout its length, from its source at Bull's Sluice to the Congaree River at or near the mouth of Rocky Branch, on the general line of the canal, with such deflections therefrom as to them may seem expedient for the better development of the said water power: *Provided*, That the canal be so enlarged as to carry a body of water 150 feet wide at the top of the water, 110 feet wide at the bottom and ten feet deep, and shall develop at least 10,000 horse power at the South side of Gervais street: *Provided, further*, That suitable fish ways for the free passage of fish be constructed in the said dam.

SEC. 4. That the said Board of Trustees shall have the right of way, and the same is hereby granted, in and along said course of the canal, for the construction and operation of the same; if in enlarging and developing the said canal, or in constructing the said dam, it becomes necessary to use the private property of any person or corporation for that purpose, the said Board of Trustees, for the sake of the public improvement contemplated in the construction of the said canal, and the better navigation of the said Broad River and Congaree River, and the transportation of supplies to market, shall have the right to acquire such right of way in the manner now provided by law.

SEC. 5. That the said canal shall be opened for navigation free of charges by the said Board of Trustees, the State reserving the right to make such improvements in the canal as may be necessary to promote navigation through the canal more rapidly than can be accomplished by the Board under this Act: *Provided*, The said Board of Trustees or lessees of the water power are indemnified against any damage arising therefrom.

SEC. 6. That the said Board of Trustees are required to build only one bridge over the canal, to wit: one on Gervais street. That the said Trustees or assigns shall not be required to build any draws or passage ways through any other bridges across the canal, unless they voluntarily build additional bridges and draws or passage ways therein shall become necessary for purposes of navigation; and if such draws and passage ways or bridges other than those above provided for should be built, they shall not be required to work the same except for their own benefit, nor shall they be required to attend on any locks which may be built.

SEC. 7. That the Board of Trustees shall, within two years from the ratificatiou of this Act, complete the said canal so as to carry a body of water 150 feet wide at the top, 110 feet wide at the bottom and ten feet deep, from the source of the canal down to Gervais street, and furnish to the State, free of charge, on the line of the canal, 500 horse power of water power, to Sullivan Fenner or assigns 500 horse power of water power, under his contract with the Canal Commission, and to furnish the city of Columbia 500 horse power of water power at any point between the source of the canal and Gervais street the city may select; and shall, as soon as is

practicable, complete the canal down to the Congaree River a few yards above the mouth of Rocky Branch: *Provided*, That the right of the State to the free use of the said 500 horse power shall be absolute, and any mortgage, assignment or other transfer of the said canal by the said Board of Trustees or their assigns shall always be subject to this right.

SEC. 8. That in order to secure and aid the speedy completion of the canal, from its source to Gervais street, for furnishing the said water power to the State and to the city of Columbia, the Board of Directors of the South Carolina Penitentiary shall furnish to the order of the said Board of Trustees such convicts as may from time to time be in the Penitentiary unemployed and not under contract and are now allowed by law to be employed or worked outside of the walls of the Penitentiary: *Provided*, That the convicts who shall be employed on the canal may at any time be leased by the Board of Directors and forthwith withdrawn from the work on the canal; that the employment of such convicts shall not interfere with the right of the Board of Directors in leasing and hiring convicts as is now or may hereafter be provided by law: *Provided, further*, That the said convicts shall be worked under the supervision of the Superintendent of the Penitentiary and work according to the plans adopted by the Trustees.

SEC. 9. That to secure the speedy development of the said canal, the Board of Trustees shall have power to borrow money by issuing bonds to the amount of $200,000, bearing interest from date at the rate of six per cent. per annum, to negotiate the same, and to use the proceeds for the construction of the said canal.

SEC. 10. That the said Board of Trustees shall have the power to mortgage the canal, with the land held therewith and all its appurtenances, to secure the payment of the principal and interest of the said bonds.

SEC. 11. That $100,000 of the said bonds shall be made payable the first day of January, A. D. 1918, and the remaining $100,000 of the said bonds shall be made payable on the first day of January, A. D. 1919. That one moiety or half of each class of bonds shall be of the denomination of $1,000 and one-half of the denomination of $500. Each shall have coupons attached, and shall bear interest at the rate of six per cent. per annum. The first coupons on the bonds maturing January the 1st, 1918, to be be payable July the 1st, 1888; the subsequent coupons shall be payable on the first day of January and July of each and every year until the maturity of the said bonds; that the first coupons of the bonds maturing the first day of January, 1919, shall be made payable on the first day of July, 1889; the subsequent coupons shall be payable on the first day of January and July of each and every year until the maturity of these last mentioned bonds, to wit: January 1st, 1919. Each and all of the said bonds shall be signed by the Chairman of the Board of Trustees and countersigned by the Secretary and Treasurer

of the said Board. Each and every coupon shall have the fac simile of the written signature of the Chairman and the Secretary and Treasurer imprinted thereon. On the back of each and every bond shall be printed the following words: The city of Columbia, South Carolina, guarantees the prompt payment of each and every coupon attached to this bond, which shall be signed by the Mayor of the city of Columbia and countersigned by the City Clerk and Treasurer and attested by the corporate seal of the said city; and the said bonds shall not be negotiable without this guarantee is signed by the said Mayor and City Clerk and Treasurer.

SEC. 12. That the said Board of Trustees shall keep a registry of the bonds signed, showing the number and amount of each bond and coupons attached. That when the bonds are signed by the Mayor and the City Clerk and Treasurer of the city of Columbia, they shall immediately thereafter be turned over to the said Board of Trustees of the Columbia Canal. That the said Board of Trustees sha'l have power to negotiate the sale of the bonds payable January 1st, 1918, forthwith; and the funds arising therefrom shall be used for the development of the said canal. That after the 1st day of January, 1889, the said Board of Trustees shall have the power to issue and sell the remaining $100,000 of bonds authorized to be issued under this Act, and devote the proceeds to the development of the said canal: *Provided*, The said Board shall not sell any bond for less than 90 per cent. of its face value.

SEC. 13. That the said Board of Trustees of the Columbia Canal shall cause an accurate abstract of the contents of this Act to be printed on the back of each of the said bonds, and on the face of each bond it shall be expressed that the same is issued under the authority of this Act.

SEC. 14. That the said Board of Trustees shall keep a correct registry of each bond sold, the number and amount of the bond, the party to whom sold and the amount received, and shall annually report to the City Council a true abstract therefrom.

SEC. 15. That if any member of the said Board of Trustees shall fraudulently issue any of the said bonds or fraudulently dispose of any money arising from the sale thereof, he shall be guilty of a misdemeanor, and upon conviction shall be punished by fine and imprisonment at the discretion of the Court.

SEC. 16. That the said Board of Trustees may, at discretion, purchase or lease any land adjoining the Columbia Canal which they may think beneficial to the successful development of the canal, and may sell or lease any land on the canal, to be used for manufactories or to facilitate the navigation of the canal. That they may also during the years 1888 and 1889, at their discretion, contract to furnish water power at three dollars or less a horse power per year for ten years, to any party who will put up a factory of 10,000 spindles, or any factory which they may think of equal importance for the development of the canal. That after the year

1889 no water power shall be sold for less than five dollars a horse power per annum.

SEC. 17. That the land, the canal and the appurtenances thereof, transferred to the said Board of Trustees of the Columbia Canal, and the bonds issued by them, shall be exempt from taxation, except for State purposes; that the buildings hereafter erected and the lands hereafter acquired shall be taxable, unless they are exempted under the general tax law of the State.

SEC. 18. That the said Board of Trustees shall after the year 1893, pay the interest on the said bonds each and every year, if practicable for them to do so; and as soon thereafter as they shall be able, from the proceeds of the rental of the water power of the canal, they shall create a sinking fund, in bonds issued by the said Board, which shall immediately be cancelled, or to be invested in bonds of the State of South Carolina: *Provided*, They can be purchased at a premium of 7 per cent., or less; and as soon as practicable the Board of Trustees shall pay all the bonds issued by the said Board, and then transfer the Columbia Canal and its appurtenances to the city of Columbia: *Provided, further*, That the city of Columbia may at any time, with the consent of the bondholders and other creditors of the said Board, take possession of the Columbia Canal, with all its appurtenances, upon assuming all the liabilities of the said Board and indemnifying its members from loss.

SEC. 19. To insure the prompt development of the said canal, and to enable the Board of Trustees to offer inducements for the speedy erection of factories on the canal below Gervais street, the said Trustees are authorized and required, before they shall employ any of the proceeds of said bonds in developing the canal below Gervais street, to secure, by contract or purchase, and control, land on the canal south of Gervais street, with frontage sufficient for at least two mill sites suitable for the erection of factories of 20,000 spindles each.

SEC. 20. That the said Board of Trustees of the Columbia Canal shall consist of five members. The Mayor shall be a member *ex officio;* the Mayor and Aldermen of the city of Columbia shall elect the other four, one from the City Council, the other three from the citizens of Columbia at large. The Mayor and the Aldermen elected shall hold their membership during the time they are members of the City Council; the other three shall hold their office for four years. The members of the Board of Trustees shall be elected by the Mayor and Aldermen of the city of Columbia at the meeting of the City Council which is held to declare the result of the vote of the legal voters of the city of Columbia authorizing the Mayor and Aldermen to guarantee the payment of the interest on the bonds to be issued by the said Board of Trustees or as soon thereafter as practicable.

SEC. 21. The said Board of Trustees shall be, and is hereby, declared a body politic and corporate. Its corporate name shall be

"Board of Trustees of the Columbia Canal." Its officers shall be a Chairman and a Secretary and Treasurer. It shall have a corporate seal; may make and enforce its by-laws for its government; may purchase, sell or lease lands adjoining the canal useful for the purposes of the canal; may sell or lease the water power of the canal subject to such rules and regulations as it shall prescribe, having first provided for the State with 500 horse power of water power at the Penitentiary, and 500 horse power of water power for Sullivan Fenner or his assigns, and 500 horse power of water power for the city of Columbia; may sue and be sued, plead or be impleaded, under their corporate name and exercise such other powers as are hereinbefore granted, and shall fix such compensation for the services of the Secretary and Treasurer as they may deem proper.

SEC. 22. That all vacancies caused in the Board of Trustees by death or from other causes shall be supplied by election by said Board, except in the case of the Mayor and the Aldermen elected by the City Council, who hold their places by virtue of their office.

SEC. 23. The said Board of Trustees, as soon as they have fully developed the said canal, and secured the payment of the debts contracted by them in its development, they shall turn over the canal with all its appurtenances to the city of Columbia.

SEC. 24. That this Act shall be of force for thirty-one years, and shall go into effect immediately upon its passage.

In the Senate House, the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

W. L. MAULDIN,
President of the Senate.
JAMES SIMONS,
Speaker House of Representatives.

Approved December 24th, A. D. 1887.

J. P. RICHARDSON,
Governor.

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO INCORPORATE THE BOARD OF TRUSTEES OF THE COLUMBIA CANAL, TO TRANSFER TO THE SAID BOARD THE COLUMBIA CANAL, WITH THE LANDS NOW HELD THEREWITH AND ITS APPURTENANCES, AND TO DEVELOP THE SAME," APPROVED DECEMBER 24TH, 1887.

SECTION 1. *Be it enacted* by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That Section 3 of an Act entitled "An Act to incorporate the Board of Trustees of the Columbia Canal, to transfer to the said Board the Columbia Canal, with the lands now held therewith and its appurtenances,

and to develop the same," approved December 24th, 1887, be, and is hereby, amended so as to read as follows:

SECTION 3. That in order to improve and develop the power of said canal for navigation, to furnish the city of Columbia with an adequate supply of water and other hydraulic purposes, they are authorized to construct a dam across Broad River at, above or below the head of the present canal, as by survey already made or hereafter to be made may be deemed advisable for the development of the said water power; and in locating and constructing the said dam they shall have the right to raise the water in Broad River to such a height as will give a head and fall of thirty-seven feet at the south side of Gervais street at mean low water, with the right to build all necessary banks, abutments and other structures on both sides of said river as may be required to complete the said canal; and the right is hereby given to widen and deepen the said canal throughout its length, from its source at Bull's Sluice to the Congaree River, at or near the mouth of Rocky Branch, on the general line of the canal, with such deflections therefrom as to them may seem expedient for the better development of the said water power: *Provided*, That the canal be so enlarged as to carry a body of water one hundred and fifty feet wide at the top of the water, one hundred and ten feet wide at the bottom, and ten feet deep, and shall develop at least ten thousand horse power at the south side of Gervais street: *Provided, further*, That for a distance of about fifty-three chains southerly from the south line of Gervais street the minimum dimensions of said canal shall be one hundred and fifty feet width at normal level of the surface of the water in the canal when completed, one hundred and ten feet width at the bottom, and ten feet depth; thence southerly for fourteen chains the canal shall be uniformly diminished so as to have the minimum dimensions at the southerly end of said fourteen chains of one hundred and twenty feet width at normal level of the surface of the water in the canal when completed, eighty feet width at the bottom, and ten feet depth; and these latter minimum dimensions shall continue to the terminus of the canal, a distance of about sixty-seven chains: *Provided, further*, That suitable fishways for the free passage of fish be constructed in the said dam.

SECTION 2. That Section 23 of said Act be, and the same is hereby, amended so as to read as follows:

SECTION 23. That the said Board of Trustees, as soon as they have fully developed the said canal and secured the payment of the debts contracted by them in its development, they shall turn over the canal, with all its appurtenances, to the city of Columbia. But the said Board of Trustees shall have full power and authority, before the said canal has been fully developed and completed and turned over to the city of Columbia, to sell, alienate and transfer the same and all its appurtenances, the lands held therewith, and all the rights and franchises conferred by this Act on said Board

of Trustees, to any person or corporation, subject, however, to all the duties and liabilities imposed thereby, and subject to all contracts, liabilities and obligations made and entered into by said Board prior to such sale and transfer, upon the approval and consent of nine members of the City Council of the city of Columbia; and before such sale, alienation and transfer is made, thirty days' notice of the offer to purchase and the terms thereof shall be given to the Council of the city of Columbia.

Approved December 24th, A. D. 1890.

AN ACT TO RATIFY AND CONFIRM THE CONTRACT MADE AND ENTERED INTO BY AND BETWEEN THE BOARD OF DIRECTORS OF THE SOUTH CAROLINA PENITENTIARY AND THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY FOR THE DEVELOPMENT OF THE FIVE HUNDRED HORSE POWER OF WATER POWER RESERVED BY THE STATE OF SOUTH CAROLINA FOR THE USE OF THE SOUTH CAROLINA PENITENTIARY, ALONG THE LINE OF THE COLUMBIA CANAL.

Whereas, at a regular meeting of the Board of Directors of the South Carolina Penitentiary, held in the city of Columbia on the 17th day of May, A. D. 1892, a resolution was unanimously adopted authorizing and instructing the Superintendent of the South Carolina Penitentiary, on behalf of the said Board, to enter into a contract with the Columbia Electric Street Railway, Light and Power Company for the development and utilization of the 500 horse power of water power reserved by the State of South Carolina for the use of the South Carolina Penitentiary, along the line of the Columbia Canal; and whereas the Superintendent of the South Carolina Penitentiary, pursuant to the said resolution of the said Board, did, on the 26th day of May, A. D. 1892, execute a contract with the said the Columbia Electric Street Railway, Light and Power Company for the development and utilization of the said water power, upon certain terms expressed in the contract; and whereas the said the Columbia Electric Street Railway, Light and Power Company, pursuant to the said contract, has erected extensive mason work, and has placed thereon water wheels for the development of the said 500 horse power of water power, and erected thereon all necessary buildings, shafting, etc., with all necessary water wheels, gate ways, and other structure for the complete development and use of the said water power, and has in all other respects fully complied with the terms of the said contract; now, therefore,

SECTION 1. *Be it enacted* by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the said

contract by and between the Board of Directors of the South Carolina Penitentiary and the Columbia Electric Street Railway, Light and Power Company for the development of the said water power be, and the same is hereby, ratified and confirmed; subject, however, to all of the conditions, limitations and restrictions in the said contract provided.

Approved December 24th, A. D. 1892.

ERRATA IN TRANSCRIPT OF RECORD.

Page. Folio.

5, 11, for "1891," read "1892."
5, 11, for "farnchises," read "franchises."
6, 12, first line, for "hindreance," read "hindrance."
6, 13, for "only," read "duly."
6, 13, strike out "and."
6, 13, fill —— with "in."
7, 14, for "was," read "were."
8, 16, strike out "and."
8, 16, strike out "so.'
9, 18, strike out "or."
12, 24, for "cabal," read "canal."
14, 27, strike out "d" after "work."
14, 28, for "Buchnana," read "Buchanan."
16, 31, for "weels," read "wheels."
16, 31, for "contact," read "contract."
17, 33, for "contarct," read "contract."
18, 34, strike out "h" in "exhonerate."
20, 38, for "contarct," read "contract."
24, 45, in second line of 21, read "answer" for "complaint."
26, 49, for "Tenner," read "Fenner."
27, 51, in first line strike out "sub-" before "defendant."
28, 52, for "argumrnt," read "argument."
28, 53, for "then," read "them"—last line but one of page.
29, 54, for "mentioned," read "maintained."
29, 55, for "presons" read "persons."
32, 61, for "munber," read "number."
33, 62, for "divisable," read "devisable."
33, 62, strike out "[illegible] capable."
36, 70, for "1897," read "1887."
37, first line, for "see," read "sell."
37, third line, strike out "to."

The Bryan Printing Company, Columbia, S. C. 17367

FIRST.

The argument filed April 15, 1898, for defendant in error, in reply to argument filed May 10, 1897, for plaintiff in error, *contra*, motion to dismiss or affirm, is considered to have been fully answered in anticipation by that argument for plaintiff in error; still plaintiff in error also submits the following rejoinder to defendant's reply:

The statement of the two questions presented in the State Courts should be as follows, rather than as given on page 1 of this argument for defendant in error:

1. Whether the contract of Talbert, Superintendent of the Penitentiary, with defendant, and the Act of Assembly ratifying and confirming it, 1892, whereby the power is conferred upon defendant to apply to its own private uses of profit and gain, outside the walls of the Penitentiary, and sell, lease, and furnish to purchasers the 500 horse power of water power (which plaintiff is bound by its contract to furnish for the use of the Penitentiary), in competition with plaintiff, who is purchaser for value from the State of the right to sell and lease the water power of the canal, subject to such rules and regulations as plaintiff shall prescribe, by prior contract with the State, 1887, does not impair the obligation of such prior contract, and deprive plaintiff of its property without due process of law?

2. Whether the defendant's contract, ratified and confirmed by the Act of Assembly, 1892, giving defendant the right as construed by the State Court to commit the acts set out in paragraphs 12 and 13 of the complaint, does not impair the obligation of the former contract of plaintiff with the State, 1887, and deprive plaintiff of its property without due process of law?

The three cases first cited on page 2 of this argument for defendant in error, while holding, as quoted, that where the constitutionality of the statute of a State is in issue, the construction given to such statute by the highest Court of that State, must be accepted by this Court in judging whether such statute conforms to the Constitution of the United States, most expressly decide that this Court has jurisdiction as the ultimate tribunal to judge whether such statute as so construed conforms to that Constitution.

Thus, in the case first cited, *Chicago, M. & St. P. Railway Co.* v. *Minnesota*, *134 U. S.*, *456*, this Court, after the holding cited for defendant in error, adds: "This being the construction of the statute by the Supreme Court of Minnesota, by which we are bound in considering the present case, we are of opinion, that so construed it conflicts with the Constitution of the United States in the particulars complained of."

The case cited, *Ill. Cent. R. R.* v. *Ill.*, *163 U. S.*, *152*, *153*, decides that the decision of the State Supreme Court, holding the State Statute there in question as construed by it not to be in vio-

lation of the Constitution of the United States, was clearly reviewable by this Court, and this Court held that the requirement of the Act there challenged was an unconstitutional hindrance and obstruction of interstate commerce, and of the passage of the mails of the United States; the judgment of the State Supreme Court, *contra non obstante.*

In the remaining one of the three cases cited for the defendant in error, *Mo. Pac. Railway* v. *Nebraska, 164 U. S., 415–417,* this Court, after laying down the proposition cited, proceeds to consider the constitutionality of the State Statute in question, and reversing the judgment of the State Supreme Court, holds that the provision of the statute challenged was, in essence and effect, the taking by a State of the private property of a corporation without the owner's consent, for the private use of others,—was not due process of law,—and was a violation of the fourteenth Article of Amendment of the Constitution of the United States.

This jurisdictional question had been decided a score of times before, *N. O. Water Works* v. *La. Sugar Co., 125 U. S., 36, 37, 38;* and if it were not so, the jurisdiction of this Court in that regard would be practically *nil.*

The construction given by the State Courts to State legislation and State Constitutions is not conclusive upon the Supreme Court of the United States, when it is called upon "to interpret the contracts of States, though they have been made in the forms of law, or by the instrumentality of a State's authorized functionaries in conformity with State legislation." *Wright* v. *Nagle, 104 U. S., 794; Jefferson Branch Bk.* v. *Skelly, 1 Black, 443; Ohio Ins. & Trust Co.* v. *Debolt, 16 How., 432, 433; State Bank of Ohio* v. *Knoop, 16 How., 391; Buttz* v. *City of Muskatine, 8 Wall, 582–584; Township of Pine Grove* v. *Talcot, 19 Wall, 678.*

Whether there was a contract, if so, what its effect was, and whether subsequent Statutes have impaired its obligation, are questions of which this Court, Supreme Court United States, always has jurisdiction, and is not bound by decision of State Court. *University* v. *People, 99 U. S., 321; L. & N. R. R.* v. *Palmes, 109 U. S., 244, 256, 257; Wright* v. *Nagle, 101 U. S., 791, 794; Vicksburg &c., R. R. Co.* v. *Dennis, 116 U. S., 667.*

When a party to a suit sets up that under one Statute a State made a contract with him, and that by a subsequent statute it violated the contract, and the highest Court of law or equity of a State has held that such subsequent Act was a valid Act, and decreed accordingly, the jurisdiction of this Court, under § 25 of the Judiciary Act, attaches. *The Binghampton Bridge, 3 Wall., 57.*

There is no relevancy whatever in the citation on page 2 of the argument from *Oxley Stave Co.* v. *County of Butler, 166 U. S., 649,* nor in the citation on page 4, there being no question of fact adequate to determine the controversy between the parties, and broad

enough to maintain the judgment, independent of the Federal question, determined adversely to plaintiff in error.

There was, in truth, no question of fact whatever, determined adversely to plaintiff in error.

To eradicate fully any impression favorable to defendants in error, which it seeks to make by the citation from the record on page 2 of the argument, it is necessary only to read the sentence from the *Record, p. 31, fol. 59*, immediately preceding the sentence with which the citation commences, showing that the contract whose construction is spoken of is the contract of defendant, 1892, not the contract of plaintiff, 1887.

"Having reached the conclusion that the State is not an indispensable party in determining this cause of action, the next question for consideration is whether or not *the contract between the State and the defendant* relative to the 500 horse power of water power is null and void." [This contract, May 26, 1892, is set out *pp. 16–19*, inclusive of *record.*] "*This* contract received legislative construction when it was ratified by the Act of the Legislature hereinbefore mentioned" [A. A. December 24, 1892, *page 38* of Brief of plaintiff in error, *ante*], "and although such construction is not binding on this Court, still *it*" [the construction placed by the Legislature, December 24, 1892, on the contract with the defendant, May 26, 1892], "shows the intention of the State *when*" [Act December 24, 1887, *pp. 30–36* of Brief of plaintiff in error, *ante*], "*it*" [the State] "reserved the 500 horse power of water power." [Read in connection with this the extract from *Mobile & Ohio R. R. Co.* v. *Tennessee, 153 U. S., 502, p. 22 of Brief of plaintiff in error, ante.*] "We think the construction placed upon *said* contract" [the contract with defendant, May 26, 1892], "in 1892 by the Legislature as to the 500 horse power reserved to the State, was in harmony with the terms of *said* contract, the proviso to section 7 of the Act of 1887, being that the right of the State to the free use of the said 500 horse power should be absolute."

The Act of December 24, 1892, does nothing more than ratify and confirm the contract of May 26, 1892, and unequivocally declare that the 500 horse power of water power was reserved by the State of South Carolina *for the use of the South Carolina Penitentiary along the line of the Columbia Canal.* A statute of a State ratifying and confirming a contract made by its agents, must, *ex vi termini*, be in harmony with the terms of that contract.

Nor can the contention of defendant derive any support whatever from the citation on page 3 of the merely individual view of Gary, A. J., *Record, pp. 33, 34, fol. 63*, in which he stands entirely alone, that the right of defendant to erect the steam plant on the banks of plaintiff's canal, depended upon the fact whether it was merely incidental to and essential to the enjoyment of the use of the water power plant, and that it must be assumed that the Circuit Judge

properly decided all questions of fact upon which his judgment had necessarily to rest. No such question of fact ever arose; the Circuit Judge made no such finding of fact; he made no finding of fact whatever on the subject; but as mere matter of law decided that by a proper construction of the contract, May 26, 1892, defendant had this *supplementary* right. *Record 21, fol. 40, Brief of plaintiff in error, pp. 12–13.*

The only relevancy which the citation, page 3 of argument for defendant in error, from *Egan* v. *Hart, 165 U. S., 188*, has, is to emphasize the doctrine that the finding of the Circuit Court, *Record, p. 20, fol. 38*, affirmed by the State Supreme Court, *Record, p. 27, fol. 50, p. 34, fol. 64*, on the only disputed question of fact, to wit: that the plaintiff was the owner in fee of the canal property, including its banks, covering the land upon which defendant erected its works,—is conclusive.

But even were plaintiff in error to concede, which it does not, or were it true, which it is not, that the Supreme Court of South Carolina did not pass upon the Act of 1892 or the contract of May 26, 1892, but based its decision solely upon the Act of 1887, still, as the State Court upholds the subsequent law of 1892, on the ground that the contract—Act of 1887—did not confer the right claimed;—as the judgment of the highest Court of the State, by its terms and necessary operation, gives effect to a subsequent provision of the State law claimed by the plaintiff in error to impair the prior contract;—as by the judgment of the State Court the subsequent statute has been brought into play and effect given to its provisions, which statute is claimed by the plaintiff in error to impair the obligation of the prior contract;—as the highest Court in the State construes the first statute creating a contract in such a manner, as that the second statute, which is alleged to impair the obligation of that contract, does not impair it, whereby the second statute remains valid under the Constitution—the validity of the second statute is clearly drawn in question under the 25th section of the Judiciary Act of 1879, and within the meaning of § 709 of the Revised Statutes of the United States, and the jurisdiction of this Court unquestionably attaches. The authorities in argument for plaintiff in error, *contra* motion to dismiss or affirm, filed May 10, 1897, *pp. 5–7 and p. 16*, are full to and conclusive upon the point.

SECOND.

The argument for defendant in error on the merits, filed March 8, 1897, is considered to be fully answered by what has gone before in this argument, still the following reply is submitted by plaintiff in error to that argument for defendant:

As to the statement of the two questions involved in this case, page 3, made for defendant, somewhat differently phrased from that made for him, page 1 of the argument in the argument in reply, on the motion to dismiss or affirm, *see ante.* Not abstracts, but the two Acts entire referred to, p. 4, are set out in the Brief for plaintiff in error, *pp. 30–39;* as also the contract of the Board of Directors of the South Carolina Penitentiary, is set out entire in the *Record*, *pp. 16–19.*

As to subdivision A of division 1 of defendant's argument, that the plaintiff did not acquire title in fee to the banks of its own canal upon which defendant's works, as alleged in paragraphs 12 and 13 of the complaint, were erected *in invitum* against the plaintiff, it is submitted:

1. That there is and can be no such question before this Court:

a. because the plaintiff only has taken steps to reverse the findings of the State Court, and the rule is settled in this Court, that a party who does not take such steps cannot take advantage of an error committed in the decree against him. It is only by a cross proceeding that the party in whose favor the Court below has decided, can do so. *Chittenden* v. *Brewster*, *2 Wall., 196; Kelsey* v. *Western*, *2 N. Y. Comstock, 505; Sands* v. *Codwise*, *4 Johns., 602;* and cross appeals must be prosecuted like any other appeals. *The S. S. Osborne*, *105 U. S., 451.*

b. because it is a question of *fact* directly decided by the State Circuit Court and unreversed by the State Supreme Court.

The statement, page 7 of defendant's argument, that "the only finding of fact in the Circuit Court decree was that the works are located on the land covered by the Rawls deed," is a clear misapprehension. To show this, it is only necessary to *re*-cite the extract cited for defendant, page 5 of his argument, correctly punctuating it, as in the *Record*, *page 20*, *fol. 39:* "As to the Rawls deed, that deed conveys the property to the State; but subsequently the State conveyed the canal property to the plaintiff *in fee*,—all of the property known as the 'Canal property,' including its banks as it existed at the time of the conveyance; and at the time of the Act of 1887, and of the conveyance made thereunder, the canal property covered the land upon which the defendant's works are erected."

There is not the slightest foundation whatever for defendant's view, page 7, that it is a fair inference from his concurrence in the result, that Justice Pope was of the same opinion as that *attributed by defendant* to Chief Justice McIver, to wit: that he conceived the question of the character of plaintiff's title to be a question of law.

For while the Chief Justice says, "I concur in the result," and proceeds to give as his reason therefor, the ground of his faith, or rather *quoad hoc*, the ground of his want of faith, as to whether the plaintiff ever acquired title to the land upon which defendant had erected the works in question; Justice Pope says only, "I concur in the result," and—closes; only that and nothing more, thereby most manifestly, inferentially at least, if not expressly, refusing concurrence in the reason assigned by the Chief Justice for his concurrence in the result. The expression used above, the opinion *attributed by the defendant* to the Chief Justice, to wit: that he conceived the question of the character of plaintiff's title to be a question of law, was used not without reason, for this is only another of defendant's inferences. What the Chief Justice said was this: "Whether plaintiff ever acquired title to the land upon which the works in question have been erected, does not depend *solely* upon the solution of a question of fact, as seems to be supposed."

The question of title to land is a question of fact—in truth, the question of fact most commonly referred by courts of equity to the courts of law for trial by a jury. That the question of title to land, and whether plaintiff is entitled to the possession of land, are questions of fact, was expressly decided in South Carolina, in *Robertson* v. *Sharpton*, 17 S. C., 592, more fully stated in manuscript decision No. 128, April Term, 1892, by the Supreme Court of South Carolina, McIver (C. J. then), A. J., delivering the opinion of the Court without dissent.

As to any question of law, whether this land, the embankment of plaintiff's canal, is plaintiff's, *see plaintiff's Brief, page 10, ante*, and *Bishop* v. *Seeley*, *18 Conn., 393*. All the plats, diagrams, maps, tracings, written plans and specifications, used on the trial and exhibited to the Court on Circuit, were by agreement of counsel filed with the Clerk of the State Supreme Court, and exhibited to that Court in the discussion before it of defendant's exception to the Circuit decree. "*2.* Because the Circuit Judge held that the plaintiff was seized in fee of the land upon which the works were erected by the defendant." *Record, p. 23, fol. 42, bottom of page 5 and top of page 6 of defendant's argument.* Under these circumstances the Circuit decision, *Record, p. 20, fol. 39*, that the State conveyed the entire canal property, including its banks, to the plaintiff *in fee*, unreversed by the State Supreme Court, entirely destroys all the idea suggested for defendant, *page 13* of his argument, that plaintiff, instead of having title to the banks of its canal, as it has to the canal itself, has only an easement therein, and is conclusive upon this Court.

2. The statement, page 9 of defendant's argument, as to the canal ever being sold or conveyed to Thompson and Nagle, is a mistake. *See plaintiff's Brief, p. 20.*

3. The only portion of subdivision A of division 1 of defendant's argument which has any real pertinency to any of the issues in-

volved in the cause, is the principle admitted in it, *page 12*, from which flows this corollary, to wit: that the right of the State to the 500 horse power of water power was *for the use of the Penitentiary, and for that use only;* but from this principle there can be deduced no corollary which under the established and decided *facts* of the case can be of any aid to defendant's contention.

As to what is said in subdivision B of division 1 of defendant's argument, the Court is respectfully referred to plaintiff's Brief, pp. 12, 13.

N. B.—The land on which plaintiff's continuous and dangerous trespasses set out in paragraphs 12 and 13 of the complaint, *Record, pp. 9, 10*, threatening irremediable injury to and the safety of plaintiff's canal, were committed, is plaintiff's land, part of the western embankment of its canal, and land other than that land of plaintiff on which defendant erected its water plant, in accordance with the plans and specifications mentioned in paragraph 11 of the complaint.

LEROY F. YOUMANS,
For Plaintiff in Error.

AN ACT TO AUTHORIZE THE CITY OF COLUMBIA TO GUARANTEE AND PAY THE COUPONS ON BONDS TO BE ISSUED BY THE "BOARD OF TRUSTEES OF THE COLUMBIA CANAL," UNDER AN ACT ENTITLED "AN ACT TO INCORPORATE THE BOARD OF TRUSTEES OF THE COLUMBIA CANAL, TO TRANSFER TO THE SAID BOARD THE CANAL, WITH THE LAND NOW HELD THEREWITH AND ITS APPURTENANCES, AND TO DEVELOP THE SAME."

SEC. 1.—Considerations. Election to be ordered.
SEC. 2.—Where and how held.
SEC. 3.—Result to be certified. The majority required.
SEC. 4.—Tax levies. Income of Canal to be paid to city.
SEC. 5.—Trustees of Canal to be elected.
SEC. 6.—Guarantee of the coupons by the city.
SEC. 7.—Registry of bonds. Payment of coupons.
SEC. 8.—Duration of Act. When to take effect.

SECTION 1. *Be it enacted* by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That inasmuch as the completion of the Columbia Canal will secure to the city of Columbia the navigation of Congaree and Broad Rivers, give it greater facilities to increase her water supply, to establish electric lights, and for other municipal purposes, the Mayor and Aldermen of said city, upon the passage of an Act entitled "An Act to incorporate the Board of Trustees of the Columbia Canal, to transfer to

the said Board the Canal, with the land now held therewith and its appurtenances, and to develop the same," shall order an election for the legal voters of the city of Columbia, to be held within two weeks after the approval of the said Act, or as soon thereafter as practicable, to determine whether or not the city of Columbia shall guarantee and pay the coupons on the bonds to be issued by the Board of Trustees of the Columbia Canal as they mature.

SEC. 2. That the said election shall be held in the different wards of the city, under the direction of the Mayor and Aldermen. Each vote deposited by legal voters of the city shall have written or printed thereon "Guarantee" or "No Guarantee."

SEC. 3. That the managers of the polls in each ward shall report to the City Council the number of legal votes cast for "Guarantee" and for "No Guarantee," and the majority of the votes cast will determine the question, and the Mayor and Aldermen shall declare the election: *Provided, however*, That it shall require a majority of all the qualified electors residing within the corporate limits of the said city of Columbia.

SEC. 4. That if the Mayor and Aldermen shall publish the election that a majority of the votes of the legal voters of Columbia which were cast at the election ordered by them was in favor of "Guarantee," then, at the same meeting of the City Council which publishes the election, or as soon thereafter as it is practicable, the Mayor and Aldermen shall be authorized and required to levy such a tax on the real and personal property assessed for taxation in the city of Columbia as may be necessary to pay the coupons, to be guaranteed by the city, maturing on the bonds to be issued by the "Board of Trustees of the Columbia Canal," for the year A. D. 1888, and shall annually thereafter levy a tax sufficient to pay the coupons as they mature on said bonds, and shall pay the same: *Provided*, That after the year 1893 the Board of Trustees of the Columbia Canal shall pay over semi-annually to the city of Columbia all the net increase derived from the sale, leasing or renting of water power, or such other sources, not exceeding in any one year the amount of the coupons maturing: *Provided, further*, That the amount of such levy, when added to the levy for the current expenses of the city and for the interest on the bonded debt of the city, shall not exceed two per cent. on the assessed value of the property in the city in any one year.

SEC. 5. That as soon after the publishing of the election of the legal voters that the majority of votes were cast for "Guarantee" as is practicable, the Mayor and Aldermen shall elect four members of the Trustees of the Columbia Canal, one from the Aldermen and three from the citizens at large.

SEC. 6. That the said Mayor and the City Clerk and Treasurer shall, as soon as practicable thereafter, sign the guarantee on the back of each bond of the following words: "The City of Columbia, South Carolina, guarantees the prompt payment of each and every

coupon attached to this bond," which may be presented to them for signature by the said "Board of Trustees of the Columbia Canal," and shall attest their signatures by the corporate seal of the City of Columbia, and as soon as signed and sealed to return the same to the said Board of Trustees of the Columbia Canal.

SEC. 7. That the Mayor and Aldermen shall keep a registry of all bonds which the Mayor and City Clerk and Treasurer have signed as guaranteeing the coupons, giving the number and denomination of bonds, and the number and amount of the coupons; that the said coupons, as they mature, shall be payable at the office of the City Clerk and Treasurer, in the city of Columbia, and shall be receivable for taxes due the city, except for water rents.

SEC. 8. That this Act shall be of force for thirty-one years, and shall go into effect immediately upon its passage.

In the Senate House, the twenty-fourth day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

W. L. MAULDIN,
President of the Senate.

JAMES SIMONS,
Speaker House of Representatives.

Approved December 24th, A. D. 1887.

J. P. RICHARDSON, Governor.

TITLE DEED TO THE CANAL.

THE STATE OF SOUTH CAROLINA.

Whereas, the General Assembly of the State of South Carolina, by an act entitled "An act to incorporate the board of trustees of the Columbia Canal, to transfer to the said board the Columbia Canal, with the lands now held therewith and its appurtenances, and to develop the same," approved December 24th, 1887, did, by the twenty-first section thereof, create the board of trustees of the Columbia Canal a body politic and corporate; and

Whereas, the said act did, by the first section thereof, provide: "That the board of directors of the South Carolina Penitentiary are hereby authorized, empowered and required to transfer, assign and release to the board of trustees of the Columbia Canal, hereinafter created and provided for, the property known as the Columbia Canal, together with the lands now held therewith, acquired under the acts of the General Assembly of this State with reference thereto, or otherwise, all and singular the rights, members, and appurtenances thereto belonging; and upon such transfer, assignment, and release, all the right, title, and interest of the State of South Carolina in and to the said Columbia Canal and the lands now held therewith, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, together with all the appurtenances thereunto belonging, shall vest in the

said board of trustees for the use and benefit of the city of Columbia, for the purposes hereinafter in this act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the said board of trustees and their assigns: *Provided*, That should the said canal not be completed to Gervais street within seven years from the passage of this act, all the rights, powers, and privileges guaranteed by this act shall cease, and the property shall revert to the State;" and

Whereas, the said board of directors of the South Carolina Penitentiary, by virtue of the power and authority conferred upon them, and in accordance with the terms and provisions of the said last mentioned section and act, did, by their deed bearing date the first day of February, 1889, recorded in the office of the register of mesne conveyance for Richland County, in the State aforesaid, in book "S" of deeds, page 262, transfer, assign, and release unto the said board of trustees of the Columbia Canal, their successors and assigns, all the right, title, and interest of the State of South Carolina in and to the Columbia Canal, and the lands held therewith, acquired under the acts of the General Assembly of this State with reference thereto or otherwise, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, with all and singular the rights, members, and appurtenances thereto belonging, for the use and benefit of the city of Columbia, for the purpose set forth in said act, subject to the conditions, limitations, and provisos therein expressed and prescribed; and

Whereas, the said act did, by the ninth section thereof, authorize and provide that in order to secure the speedy development of the said canal, the board of trustees should have power to borrow money by issuing bonds to the amount of $200,000, bearing interest from date at the rate of six per cent. per annum, to negotiate the same, and use the proceeds for the construction of said canal; and

Whereas, the said act did, by the tenth section thereof, authorize and provide that the said board of trustees shall have the power to mortgage the canal, with the land held therewith, and all its appurtenances, to secure the payment of the principal and interest of said bonds; and

Whereas, the General Assembly of the State of South Carolina, by an act entitled "An act to authorize the city of Columbia to guarantee and pay the coupons on bonds to be issued by the board of trustees of the Columbia Canal, under an act entitled 'An act to incorporate the board of trustees of the Columbia Canal, to transfer to said board the canal, with the lands now held therewith, and its appurtenances, and to develop the same,'" approved December 24, 1887, did authorize the mayor and aldermen of the city of Columbia to order an election to determine whether or not the city of Columbia should guarantee and pay the coupons on the bonds to be issued by the board of trustees of the Columbia Canal, as they mature; and

Whereas, in pursuance of the provisions of said last mentioned

act, the said mayor and aldermen of said city did order an election to determine whether or not the city of Columbia should guarantee and pay said coupons, and whereas said election resulted in favor of said proposed guarantee; and

Whereas, in pursuance of said act first above mentioned, the said board of trustees has executed and issued first mortgage bonds to the amount of $200,000, numbered from 1 to 300, inclusive, bearing interest at the rate of six per cent. per annum, and the said board, in order to secure the said bonds, has made, executed, and delivered a mortgage of the said canal, with the land held therewith, and all its appurtenances, which mortgage has been duly recorded in the office of the register of mesne conveyances for Richland County, in the State aforesaid, in book "Q" of mortgages of real estate, page 595, and in book "5" of mortgages of personal property, page 7; and in pursuance of said act last above mentioned, the mayor and city clerk and treasurer have affixed their signatures to the said guarantee of the city of Columbia; and

Whereas, the General Assembly of the State of South Carolina, by section 2 of an act entitled "An act to amend an act entitled 'An act to incorporate the board of trustees of the Columbia Canal, to transfer to the said board the Columbia Canal, with the lands now held therewith and its appurtenances, and to develop the same,'" approved December 24, 1890, did provide: "Section 2. That section 23 of said act be, and the same is hereby, amended, so as to read as follows: 'Section 23. That the said board of trustees, as soon as they have developed the said canal, and secured the payment of the debts contracted by them in its development, they shall turn over the canal, with all its appurtenances, to the city of Columbia. But the said board of trustees shall have full power and authority, before the said canal has been fully developed and completed, and turned over to the city of Columbia, to sell, alienate, and transfer the same, and all its appurtenances, the lands held therewith, and all the rights and franchises conferred by this act on said board of trustees, to any person or corporation, subject, however, to all the duties and liabilities imposed thereby, and subject to all contracts, liabilities, and obligations made and entered into by said board prior to such sale and transfer, upon the approval and consent of nine members of the city council of the city of Columbia; and before such sale, alienation, and transfer is made, thirty days notice of the offer to purchase and the terms thereof shall be given to the council of the city of Columbia;" and

Whereas, George Wallace, on July 14th, 1891, made the following proposition to the board of trustees of the Columbia Canal and the mayor and aldermen of the city of Columbia for the purchase of the Columbia Canal: "I will pay for the canal completed to Gervais street, transferred to me under the authority of the act of the General Assembly of December 24, 1890, and subject to the conditions, duties, and liabilities thereby imposed, and by other acts of

the General Assembly relating thereto, excepting therefrom, for the use of the city of Columbia, a strip of land on the east and west side of the canal, from the north side of Laurel to the south side of Blanding streets, the two hundred thousand dollars of mortgage bonds on the canal when the same shall mature, and will guarantee to pay the interest on the said bonds as the same may fall due, in such manner as shall be satisfactory to the city council and it may approve of, when the canal completed to Gervais street shall be transferred and possession given, said payment and guarantee of interest to commence from the transfer and delivery of the possession of the canal, and sixty thousand dollars to be payable as follows: Fifteen thousand dollars cash upon the approval of the title to the canal by our attorney, and signing of the contract for sale, which shall be within seven days from the signification of the city council that they will accept this proposition; and fifteen thousand dollars within twenty days from the date of the signing of the contract; and thirty thousand dollars upon the completion of the canal to Gervais street, said completion to be approved of by Mr. Byron Holly, the engineer in charge of the work, and the delivery and transfer of the possession of the canal, which shall be not later than November 1, 1891. If, however, the canal is not completed to Gervais street and possession given by the first day of November, 1891, the board of trustees are to allow the undersigned interest at the rate of six per cent. per annum on the sums of money previously paid, until the canal is so completed and possession given. That the undersigned will allow free of charge, whenever the city should require it for its use, an additional one hundred horse power of water power to five hundred given by the act to the city of Columbia. The city of Columbia shall have the right to bridge the canal at its water works to reach the same, under the regulations prescribed by act of December 24, 1887;" and

Whereas, the said proposition was accepted by the board of trustees of the Columbia Canal, and upon being submitted to the city council of Columbia, the same was unanimously approved and consented to, at a meeting held on July 15, 1891, eleven members of the city council being present, and approving and consenting thereto; and

Whereas, the said agreement for the purchase of the Columbia Canal was, on the 4th day of August, 1891, duly assigned by George Wallace to Aretas Blood, and on the 24th day of September was duly assigned by said Aretas Blood to the Columbia Water Power Company, a corporation duly incorporated by and under the laws of the State of South Carolina; and

Whereas, under said agreement the board of trustees of the Columbia Canal and the city of Columbia have received the sum of $30,000, agreed to be paid by the purchasers of said canal within twenty days from the acceptance of the proposition to purchase; and

Whereas, the said George Wallace, in the contract of purchase

hereinabove set forth, did agree to guarantee to pay the interest on the said bonds as the same may fall due, in such manner as shall be satisfactory to the city council and it may approve of; and whereas, in pursuance of said agreement the said Columbia Water Power Company, the assignee of said contract, has entered into a written agreement under seal with the city council of the city of Columbia to pay the interest upon the said canal bonds as the same shall fall due, wherein the said Columbia Water Power Company has agreed to deposit certain bonds in the cities of New York and Columbia for the purpose of guaranteeing the payment of the interest on said bonds, and wherein the said Columbia Water Power Company has, among other things, agreed that on default of payment of interest as the same shall fall due, for six months, the bonds deposited in the cities of New York and Columbia shall become the property of the city of Columbia, and the trustees holding the same shall be authorized to deliver the same to the city of Columbia, and the said Columbia Water Power Company shall lose all interest under the aforesaid contract of George Wallace with the board of trustees of the Columbia Canal and the city of Columbia, and also all interest under such deed as shall be made to said Columbia Water Power Company, and the said property shall immediately vest in the city of Columbia, and the said Columbia Water Power Company shall thereupon execute title deed to the city of Columbia therefor; and wherein said Columbia Water Power Company has, among other things, also agreed that in case at any time the market value of the said bonds should depreciate to or below ninety-five cents on the dollar, or any of said bonds shall be hypothecated or sold, as in said agreement provided, the said Columbia Water Power Company shall, within thirty days after notice, make up such deficiency, whether the same be in amount or value, by deposit of sufficient bonds, selling not below par, and if such deficiency shall not be made up within six months from the date of such notice, then the same consequence to ensue as in case of default in payment of interest for six months; and

Whereas, the said Columbia Water Power Company has made such deposit, which said agreement and deposit have been accepted by the said city council of the city of Columbia as a satisfactory guarantee of the payment of said interest in pursuance of said contract, and the same has been duly approved by said city council; and

Whereas, the said canal has not been fully developed and completed throughout its entire length from its source at Bull's Sluice to the point where it empties into the Congaree River, and has not been turned over to the city of Columbia, but the same has been completed to Gervais street, as appears by the certificate of Byron Holly, chief engineer, of date December 11, 1891; and

Whereas, nine members of the city council of the city of Columbia approve and consent to the sale and transfer of the Columbia Canal, and the lands held therewith, and all the rights, easements,

privileges, appurtenances, and franchises conferred on the board of trustees of the Columbia Canal, and otherwise acquired, on the terms herein contained; and

Whereas, thirty days notice of the said sale, alienation, and transfer, and the terms thereof, has been given to the city council of the city of Columbia.

Now, therefore, know all men by these presents, that the said board of trustees of the Columbia Canal, a corporation duly incorporated as aforesaid under the laws of the State of South Carolina, in pursuance of the power vested in them by the General Assembly of the State of South Carolina, by section 23 of the act last above mentioned, as amended on December 24, 1890, and by and with the approval and consent of nine members of the city council of the city of Columbia, in consideration of the sum of $30,000 to them heretofore paid, within twenty days after the making of the contract of sale as aforesaid, and in the further consideration of the sum of $30,000 to them this day paid by the said Columbia Water Power Company, the receipt whereof is hereby acknowledged, and in consideration, also, of the payment by the said Columbia Water Power Company of the $200,000 of the said mortgage bonds on the canal when the same shall mature, and in consideration of the guarantee of payment of interest as aforesaid, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release, unto the said Columbia Water Power Company, its successors and assigns, forever, all that property, situate, lying, and being in the State of South Carolina, in and near the city of Columbia, known as the Columbia Canal, and the lands held therewith, acquired under the acts of the General Assembly of said State with reference thereto, or otherwise, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, at or near the mouth of Rocky Branch, including all lands, easements, rights of way, rights of overflow, and appurtenances, acquired by the said board of trustees of the Columbia Canal in the development and improvement of the said canal or otherwise, whether the same be in Richland County or Lexington County, together with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging, or in any wise incident or appertaining, and together with all the rights and franchises conferred by the acts of the General Assembly of the State of South Carolina on the said board of trustees of the Columbia Canal, excepting therefrom for the use of the city of Columbia a strip of land on the east and west side of the said canal from the north side of Laurel street to the south side of Blanding street,

To have and to hold, all and singular the premises before mentioned unto the said Columbia Water Power Company, their successors and assigns, forever, subject, nevertheless, to the conditions, limitations, provisos, and exceptions set forth and prescribed in the

acts of the General Assembly of the State of South Carolina hereinabove mentioned, and subject to the provisions of the proposition of George Wallace, of July 14th, 1891, hereinbefore contained; and subject also to the agreement of the Columbia Water Power Company, of date the day of , 1892, wherein the said Columbia Water Power Company did agree that on default of payment of interest on said canal bonds, as any of the same should fall due, for six months, said Columbia Water Power Company should lose all interest under the contract of George Wallace with the board of trustees of the Columbia Canal and the city of Columbia, also all interest under such deed as should be made to said company of the canal property, and that the said property should immediately vest in the city of Columbia, and that said company would thereupon execute a title deed to the city of Columbia therefor; and wherein, also, the said Columbia Water Power Company did also agree, in case at any time the market value of said bonds should depreciate to or below ninety-five cents on the dollar, or any of the said bonds should be hypothecated or sold, as provided in said agreement, that said company should within thirty days after notice make up such deficiency, whether the same be in amount or value, by deposit of sufficient bonds selling not below par; and that if such deficiency should not be made up within six months from the date of such notice, then the same consequence to ensue as in case of default in payment of interest for six months.

And the said board of trustees of the Columbia Canal do hereby bind themselves and their successors to warrant and forever defend all and singular the said premises unto the said Columbia Water Power Company, their successors and assigns, against ourselves and our successors, lawfully claiming or to claim the same or any part thereof.

In witness whereof, the said board of trustees of the Columbia Canal has caused its corporate seal to be affixed to these presents, and the members of said board of trustees of the Columbia Canal have hereunto subscribed their names, this 11th day of January, in the year of our Lord 1892, and in the 116th year of the sovereignty and independence of the United States of America.

F. W. McMASTER, [L. S.]
Chairman Board of Trustees of the Columbia Canal.
W. B. LOWRANCE,
Secretary and Treasurer.
W. B. LOWRANCE, [L. S.]
JOHN T. RHETT, [L. S.]
RICHARD S. DESPORTES, [L. S.]
F. W. McMASTER, [L. S.]
C. H. MANSON, [L. S.]

Signed, sealed, and delivered in the presence of
A. H. MONTEITH.
W. C. CATHCART.

SOUTH CAROLINA, }
Richland County. }

Personally appeared before me, A. H. Monteith, and made oath that he saw F. W. McMaster, chairman, and William B. Lowrance, secretary and treasurer, John T. Rhett, Richard S. Desportes, and C. H. Manson, members of the board of trustees of the Columbia Canal, sign the above written deed, and affix thereunto the corporate seal of said board, and, as their act and deed, deliver the above written deed for the uses and purposes therein mentioned; and that he, with W. C. Cathcart, witnessed the execution thereof.

A. H. MONTEITH.

Sworn to before me, this 20th day of January, A. D. 1892.
ALLEN J. GREEN, [L. S.] *Notary Public.*

THE STATE OF SOUTH CAROLINA.

Know all men by these presents: Thirty days notice of the offer to purchase the Columbia Canal, and the terms thereof, having been given to the council of the city of Columbia before the within sale, alienation, and transfer, we, members of the city council of the city of Columbia, in accordance with the provisions of the act of the General Assembly of the State of South Carolina, do hereby approve of and consent to said alienation, sale and transfer, and in testimony thereof have affixed hereunto our respective signatures, in the city of Columbia, this 20th day of January, in the year of our Lord 1892, and in the 116th year of the sovereignty and independence of the United States.

F. W. MCMASTER, *Mayor.*
G. V. ALLWORDEN, } *Aldermen*
W. MCB. SLOAN, } *from Ward 1.*
PHILIP MOTZ, } *Aldermen*
E. J. BRENNEN, } *from Ward 2.*
R. S. DESPORTES, }
W. C. FISHER, } *Aldermen*
C. C. HABENICHT, } *from Ward 3.*
JAS. M. SMITH, } *Aldermen*
JOS. H. GREEN, } *from Ward 4.*

Signed and delivered in the presence of
A. H. MONTEITH,
W. C. CATHCART.

SOUTH CAROLINA, }
Richland County. }

Personally appeared A. H. Monteith, who, being duly sworn, says he saw the above named F. W. McMaster, mayor, and G. V. Allworden, W. McB. Sloan, Philip Motz, E. J. Brennen, R. S. Desportes, W. C. Fisher, C. C. Habenicht, James M. Smith, and Jos. H. Green, nine of the aldermen, composing the city council of the

city of Columbia, sign and deliver the above written instrument, and that he, with W. C. Cathcart, witnessed the execution thereof.

A. H. MONTEITH.

Sworn to and subscribed before me, this 20th day of January, 1892. ALLEN J. GREEN, [L. S] *Not. Pub. S. C.*

The injury inflicted upon and threatening plaintiff, by the defendant's diversion of the 500 horse power of water power from the use of the penitentiary to the private gain and profit of defendant, is continuous, of the gravest nature, and as irremediable as the injury inflicted upon and threatening the safety of plaintiff's canal by defendant's excavation of the canal's embankment.

This takes place in this wise:

Among the objects of the completion of the canal was giving the city of Columbia greater facilities to increase her water supply, *to establish electric lights.* § *1, A. A. December 24, 1887, 19 St., 1097.*

The city of Columbia is the beneficiary of the conveyance of the canal to the Board of Trustees. § *1, A. A. December 24, 1887, 19 St., 1091; ante, page 31.*

The conveyance by the Board of Trustees of the canal to the plaintiff is redolent of advantages (outside of and in addition to the provisions of the A. A. 1887), exacted from plaintiff, by and for the city of Columbia.

In consequence of those advantages, the city of Columbia, for value, approved of and consented to this conveyance of the canal and all the rights and franchises conferred by the Acts of the General Assembly on the Board of Trustees, including the exclusive right and franchise "to sell and lease the water power of the canal, subject to such rules and regulations as plaintiff should prescribe."

Yet—despite all this, in consequence of its having granted certain privileges to defendant for the purpose of defendant's establishing, for defendant's private profit and gain, electric lights in the city, from the development of this 500 horse power of water power—the city of Columbia has refused permission and facilities to another electric company, which proposes to establish electric lights in the city, from development of water power, with which plaintiff has contracted to supply said other electric company from the water power of plaintiff's canal, independent and outside of this 500 horse power of water power.

Thus the plaintiff, in so far as this phase of the matter is concerned, is deprived not only of the monopoly of the right and franchise of which the Board of Trustees and the city of Columbia are the grantors and vendors for value, but of this right and franchise entirely—and the monopoly thereof is bestowed *ex gratia* upon the defendant.

LEROY F. YOUMANS,
For Plaintiff in Error.

No. 67.
Sup. Ct. of Columbia for P. C.

Office Supreme Court U. S.
FILED
DEC 8 1898
JAMES H. McKENNEY,
Clerk.

Filed Dec. 8, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1898.

THE COLUMBIA WATER POWER COMPANY,
Plaintiff in Error

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY,
Defendant in Error.

No. 67.

Reference to authorities, additional to those cited in the two briefs of Plaintiff in Error.

BRIEF ON THE MERITS.

Page 12 at end of first paragraph—

Allen v. *San Jose Land and Water Co.*, 92 Cal., 138.

Page 18 immediately before last paragraph:

The prohibition of the Federal Constitution extends to State laws violating the obligation of implied as well as of express contracts.

Stewart v. *Police Jury*, 116 U. S.. 134.

Page 23, at end of first paragraph, immediately before N. B.:

The fact that persons are trustees for *cestui que* trusts does not prevent them from being absolutely entitled.

2 Lewin on Trusts, 1023 *note E.*

"*For the use of*"—exclusive of use of others.

Wademann v. *Alb. & Susq. R. R. Co.*, 51 N. Y., 570;
McCloskey v. *Miller*, 72 Penna. State, 151.

Page 24, at end of page:

In *Goodrich* v. *Burbank*, 12 Allen, 459, 90 Am. Decs., 162: "There is no restriction as to the place where, or the purpose for which the water might be used, but only as to the quantity reserved."

Notes 14 L. R. A., 300–335;
Notes 20 L. R. A., 632, 635, 637.

Page 26, just before middle of page, immediately after reference to Pollock on Contracts:

Wordsworth v. *Smith*, 11 Me., 278; 26 Am. Dec., 527.

Page 27, at end of first paragraph:

Pomeroy on Specific Performance of Contracts, § 480;
Sternberger v. *McGovern*, 56 N. Y., 12, 20, 21;
County of Mobile v. *Kimball*, 120 U. S., 691;
Sanders v. *Richardson*, 10 Rich. Eq., 244.

Page 28, middle of page:

Scott v. *Donald*, 165 U. S., 112, 113, "whilst the State can not be compelled by suit to perform its contracts,

any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted, and any law impairing the obligation of contracts under which such property or rights are held, is void, and powerless to affect their enjoyment."

Haus v. *La.*, 134 U. S., 20 21.

Page 25, in last paragraph, after Manning *v.* Wasdale, 2 Harr. & Wall., 441, add:

Reported also *5 Adol. & Ellis*, 758, 31 E. C. L.; *Major* v. *Chadwick*, 11 Adol. & Ell., 571.

Argument, *contra* motion to dismiss or affirm, on the the question of jurisdiction.

Page 4, line 2:

Adams Co. v. *B. & M. R. R.*, 112 U. S., 123, 127.

Page 16, at end:

As to jurisdiction—

Stewart v. *Kahn*, 11 Wall., 493, 502;

Grand Gulf R. R. & Bkg. Co. v. *Marshall*, 12 How., 167;

Moore v. *Ill*, 14 How., 13;

Maxwell v. *Newbold*, 18 How., 516;

Walker v. *Sauvinet*, 92 U. S., 393;

Arrowsmith v. *Harmoning*, 118 U. S., 95.

Pleadings and decisions in *Wilson* v. *Blackbird Marsh Creek Co.*, 2 Peters, 245, and in *Kankanna Co.* v. *Green Bay & Miss. Canal*, 142 U. S., 269.

LE ROY F. YOUMANS,
For Plaintiff in Error.

FILED
AUG 28 1907
J. H. KINNEY,
CLERK

No. 159

THE COLUMBIA WATER POWER COMPANY,
Plaintiff in Error,

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, Defendant in Error.

In Error to the Supreme Court of the State of South Carolina.

At Columbia, S. C.

MOTION TO DISMISS OR TO AFFIRM

AND

BRIEF OF ARGUMENT FOR THE MOTION.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 729.

THE COLUMBIA WATER POWER COMPANY,
PLAINTIFF IN ERROR,

versus

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of South Carolina, at Columbia, S. C.

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Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 729.

The Columbia Water Power Company, Plaintiff in Error,

Against

The Columbia Electric Street Railway, Light and Power Company, Defendant in Error.

Now comes the Defendant in Error, by its Counsel appearing in that behalf, and moves the Court to dismiss the Writ of Error in the above entitled cause for want of jurisdiction, because the judgment brought up on said Writ of Error is the judgment of the Supreme Court of the State of South Carolina, sitting at Columbia, S. C., and it appears that no Federal question was involved in said judgment and the decision of said cause.

And the said Defendant in Error, by Counsel as aforesaid, also moves the Court to affirm the judgment brought up by said Writ of Error, because, although the record of said cause may show that this Court has jurisdiction in the premises, it is manifest that said question involved was frivolous, and that said Writ of Error was sued out for delay only.

JOHN T. SLOAN,
WM. H. LYLES,

Counsel for Defendant in Error for the Purposes of These Motions Only.

Supreme Court of the United States.

OCTOBER TERM, 1896.

The Columbia Water Power Company, Plaintiff in Error,

Against

The Columbia Electric Street Railway, Light and Power Company, Defendant in Error.

To Leroy F. Youmans, Esq., Attorney for Plaintiff in Error:

Please take notice that on Monday, the 3rd day of May, A. D. 1897, at the opening of the Court, or as soon thereafter as Counsel can be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of said Court thereon. Annexed hereto is a copy of the brief of Argument to be submitted with said motions in support thereof.

JOHN T. SLOAN,
WM. H. LYLES,

Counsel for Defendant in Error for the Purposes of These Motions Only.

ABSTRACT OF CASE.

Prior to the 24th day of December, 1887, the State of South Carolina was the owner of the Columbia Canal and its appurtenances, which was in the custody of the Board of Directors of the South Carolina Penitentiary, in process of development. By an Act of the General Assembly approved on that day, 19 Stats., page 1,090, entitled "An Act to Incorporate the Board of Trustees of the Columbia Canal, to Transfer to the Said Board the Columbia Canal with the Lands now Held Therewith and Its Appurtenances and to Develop the Same," it was provided:

"Section 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the Board of Directors of the South Carolina Penitentiary are hereby authorized, empowered and required to transfer, assign and release to the Board of Trustees of the Columbia Canal, hereinafter created and provided for the property known as the Columbia Canal, together with the lands now held therewith, acquired under the Acts of the General Assembly of this State with reference thereto or otherwise, all and singular the rights, members and appurtenances thereto belonging; and upon such transfer, assignment and release all the right, title and interest of the State of South Carolina in and to the said Columbia Canal and the lands now held therewith, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, together with all the appurtenances thereunto belonging, shall vest in the said Board of Trustees for the use and benefit of the city of Columbia, for the purposes hereinafter in this Act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the

said Board of Trustees and their assigns: Provided, That should the said canal not be completed to Gervais street within seven years from the passage of this Act all the rights, powers and privileges guaranteed by this Act shall cease, and the said property shall revert to the State."

* * * * * * * * * *

"Section 7. That the Board of Trustees shall, within two years from the ratification of this Act, complete the said canal so as to carry a body of water 150 feet wide at the top, 110 feet wide at the bottom and 10 feet deep, from the source of the canal down to Gervais street, and furnish to the State, free of charge, on the line of the canal, 500 horse power of water power, to Sullivan Fenner or assigns 500 horse power of water power, under his contract with the Canal Commission, and to furnish the city of Columbia 500 horse power of water power at any point between the source of the canal and Gervais street the city may select; and shall, as soon as is practicable, complete the canal down to the Congaree River a few yards above the mouth of Rocky Branch: Provided, That the right of the State to the free use of the said 500 horse power shall be absolute, and any mortgage, assignment or other transfer of the said canal by the said Board of Trustees or their assigns shall always be subject to this right."

* * * * * * * * * *

"Section 21. The said Board of Trustees shall be, and is hereby, declared a body politic and corporate. Its corporate name shall be 'Board of Trustees of the Columbia Canal.' Its officers shall be a Chairman and a Secretary and Treasurer. It shall have a corporate seal; may make and enforce its by-laws for its government; may purchase, sell or lease lands adjoining the canal useful for the purposes of the canal; may sell or lease the water power of the canal, subject to

such rules and regulations as it shall prescribe, having first provided for the State with 500 horse power of water power at the Penitentiary, and 500 horse power of water power for Sullivan Fenner or his assigns, and 500 horse power of water power for the city of Columbia; may sue and be sued, plead or be impleaded, under their corporate name, and exercise such other powers as are hereinbefore granted, and shall fix such compensation for the services of the Secretary and Treasurer as they may deem proper."

Section 23 of this Act was amended by an Act of the General Assembly approved the 24th day of December, 1890, 20 Stats., page 967, entitled "An Act to Amend an Act Entitled 'An Act to Incorporate the Board of Trustees of the Columbia Canal, to Transfer to the Said Board the Columbia Canal, with the Lands Now Held Therewith and Its Appurtenances, and to Develop the Same,' Approved December 24th, 1887," so as to read as follows, to wit:

"Section 23. That the said Board of Trustees, as soon as they have fully developed the said canal and secured the payment of the debts contracted by them in its development, they shall turn over the canal, with all its appurtenances, to the city of Columbia. But the said Board of Trustees shall have full power and authority, before the said canal has been fully developed and completed and turned over to the city of Columbia, to sell, alienate and transfer the same and all its appurtenances, the lands held therewith, and all the rights and franchises conferred by this Act on said Board of Trustees, to any person or corporation, subject, however, to all the duties and liabilities imposed thereby, and subject to all contracts, liabilities and obligations made and entered into by said board prior to such sale and transfer, upon the approval and consent of nine members of the City Council of the city of Columbia; and before such sale, alienation and transfer is made, thirty

days' notice of the offer to purchase and the terms thereof shall be given to the Council of the city of Columbia."

On the 11th day of January, 1892, the Board of Trustees so created by the aforesaid Act, pursuant to its provisions, conveyed the canal and its appurtenances to the Plaintiff in Error.

On the 26th day of May, 1892, the Board of Directors of the South Carolina Penitentiary entered into a contract with Defendant in Error which contained the following provisions, to wit:

"Whereas, at a regular meeting of the Board of Directors of the South Carolina Penitentiary, held in the city of Columbia on the 17th day of May, A. D. 1892, the following resolution was unanimously adopted, to wit:

" 'Whereas, under the Acts of General Assembly providing for the transfer of the Columbia Canal to the Board of Trustees, and authorizing the sale thereof by said Board of Trustees, there was reserved for the State of South Carolina, for the use of the South Carolina Penitentiary, 500 horse power on the line of the said canal; and whereas, to utilize said water power and make the same available for the purposes of the Penitentiary, it would require the expenditure of a large sum of money, which has not been provided for; and

" 'Whereas, the Columbia Electric Street Railway, Light and Power Company, in consideration of the privileges, uses and enjoyments hereinafter expressed, has offered to develop the same for the Penitentiary, and the said proposition is deemed greatly to the advantage of the State of South Carolina, and also of the Penitentiary; now, therefore, be it resolved—' "

* * * * * * * * * *

"Now, therefore, know all men by these presents:

"First. That the said the Columbia Electric Street Railway, Light and Power Company, party of the second part, in con-

sideration of the premises, and in consideration of the rights, privileges and immunities hereinafter set forth, covenants and agrees, at its own cost and expense, to build, erect and complete on the western bank of the Columbia Canal, opposite the South Carolina Penitentiary, at or near the point where the water wheel of the South Carolina Penitentiary formerly stood, all necessary bulk-heads, water-ways, water-gates, tail-races, mason work and buildings, and to erect suitable water wheels thereon of the most modern and improved patterns, of sufficient capacity to utilize and develop the said 500 horse power of water power; the said work to be completed and ready for use within twelve months after the execution of this contract; and the said party of the second part further covenants and agrees, at its own cost and expense, to maintain and operate the said water wheels for the development and utilization of the said 500 horse power of water power for and during the continuation of this contract. And the said party of the second part further covenants and agrees to transmit across the said Columbia Canal, to some convenient point within the walls of the said Penitentiary, to be indicated by the superintendent thereof, so many horse power, not to exceed the sum of 100 horse power, for the use and benefit of the said South Carolina Penitentiary; the said power to be delivered, when required by the party of the first part, at the point above indicated, from electric generators, or in such other form as the party of the second part may elect."

* * * * * * * * * * *

"Second. That the said party of the first part, on behalf of the Board of Directors of the South Carolina Penitentiary, covenants and agrees to allow to the said party of the second part, for the purpose of the development of the said water power, the use and enjoyment of all the right, title and interest that the State of South Carolina and the Board of Directors of the South Carolina Penitentiary, by reason of the Acts

of the Legislature hereinbefore referred to, have in and to all the land on the west side of the Columbia Canal, between the said canal and the river opposite the walls of the said Penitentiary, for and during the term of this contract. And the said party of the first part further covenants and agrees with the party of the second part, that the right, title and interest so conveyed is sufficient for the erection of the said bulkheads, water-ways, water-gates, tail-races and buildings; and further agrees to allow to the said party of the second part, to be used in the erection of the said work, all the stone masonry and other material now on the said land, together with the privilege of quarrying and using such other stone, earth and other material as may be necessary for the erection and proper execution of said work; and the party of the first part further covenants and agrees that the said party of the second part shall have, for and during the continuation of this contract, the free and uninterrupted use and enjoyment of the right of way along the banks of the said canal to and from Gervais street to the works so to be erected. And the party of the first part, in consideration of the covenants and agreements by and on the part of the party of the second part, hereby further covenants and agrees to allow the said party of the second part the free and uninterrupted use of the said 500 horse power of water power so reserved by the State of South Carolina for the use of the South Carolina Penitentiary, saving and excepting the 100 horse power of water power so reserved for the use of the Penitentiary, as hereinbefore stated.

"Third. And the said party of the second part, in consideration of the premises, and further in consideration of the use of the said 500 horse power of water power, hereby covenants and agrees to pay to the said party of the first part the sum of $2,500 per annum for each and every year during the continuation of this contract, commencing when said work shall have been completed and ready for use, less a deduction of $5

per horse power for each and every horse power transmitted in the manner and the form aforesaid by the party of the second part for the use of the party of the first part—the said payments to be made in monthly instalments and payable at the end of each and every month.

"Fourth. And it is mutually agreed by and between the parties hereto that this contract shall continue and be of force for and during the period of thirty years from the date of the execution of the contract; provided, however, that at the expiration of said period this contract may be continued upon such terms as may be mutually agreed upon by and between the parties thereto; and in the event that the said contract be not continued, the said party of the second part shall have the right, within six months after the expiration of said contract, to remove the water wheel and all other machinery by the said party of the second part furnished and erected under the terms of this contract; leaving, however, for the use of the said Penitentiary all mason work, bulk-heads; water-ways, tail-races and buildings which shall have been erected."

By an Act of the General Assembly approved December 24th, 1892, 21 Stats., page 94, entitled "An Act to Ratify and Confirm the Contract Made and Entered Into by and Between the Board of Directors of the South Carolina Penitentiary and the Columbia Electric Street Railway, Light and Power Company for the Development of the Five Hundred Horse Power of Water Power Reserved by the State of South Carolina for the Use of the South Carolina Penitentiary, Along the Line of the Columbia Canal," it was enacted:

"Whereas, at a regular meeting of the Board of Directors of the South Carolina Penitentiary, held in the city of Columbia on the 17th day of May, A. D. 1892, a resolution was unanimously adopted authorizing and instructing the Superintendent of the South Carolina Penitentiary, on behalf of the said Board, to enter into a contract with the Columbia Elec-

tric Street Railway, Light and Power Company for the development and utilization of the 500 horse power of water power reserved by the State of South Carolina for the use of the South Carolina Penitentiary, along the line of the Columbia Canal; and, whereas, the Superintendent of the South Carolina Penitentiary, pursuant to the said resolution of the said Board, did, on the 26th day of May, A. D. 1892, execute a contract with the said the Columbia Electric Street Railway, Light and Power Company, for the development and utliization of the said water power upon certain terms expressed in the said contract; and, whereas, the said the Columbia Electric Street Railway, Light and Power Company, pursuant to the said contract, has erected extensive mason work, and has placed thereon water wheels for the development of the said 500 horse power of water power, and erected thereon all necessary buildings, shafting etc., with all necessary water wheels, gateways and other structure for the complete development and use of the said water power, and has in all other respects fully complied with the terms of the said contract; now, therefore,

"Section 1. Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same, That the said contract by and between the Board of Directors of the South Carolina Penitentiary, and the Columbia Electric Street Railway, Light and Power Company, for the development of the said water power, be, and the same is hereby, ratified and confirmed, subject, however, to all of the conditions, limitations and restrictions in the said contract provided."

This action was duly commenced by the Plaintiff in Error against the Defendant in Error in the Court of Common Pleas for the County of Richland and State of South Carolina, the Complaint alleging the aforesaid Statutes, Deed and Contract, and concluding with the prayer for an injunction, etc.

The Defendant in Error filed its Answer, which contained the following amongst other matters:

"III. It denies that the 500 horse power of water required to be furnished to the State of South Carolina was provided solely for the purpose of use by the State itself in its public institutions, and denies that it was not intended or provided for any use that the State of South Carolina might choose to put the same to. On the contrary, it alleges that by an Act of the General Assembly, referred to in said complaint as constituting the Board of Trustees of the Columbia Canal, it was expressly provided that said board should 'furnish to the State, free of charge, on the line of the canal, 500 horse power of water power: Provided, That the right of the State to the free use of the said 500 horse power shall be absolute, and any mortgage, assignment or other transfer of said canal by the Board of Trustees, or their assigns, shall always be subject to this right.'"

The cause came on to be tried, and resulted in the following Decree:

"This cause came on to be heard before me at the present term of the Court, and has been fully argued.

"As to the question raised that the Court has no jurisdiction because that the State is an indispensable party, this plea is overruled. The Court has jurisdiction. The defendant is a lessee of the water power reserved by the State, and the Court can construe a contract made between the defendant and the State, whereby it is claimed that the rights of the plaintiff have been affected. The door is not shut to plaintiff because of the contract with the State; the State has a right to come in if she so wishes; but she declares that she will not come in, and the cause can be heard without her presence.

"As to the Rawls deed, that deed conveys the property to the State; but subsequently the State conveyed the canal property to the plaintiff, and thereby conveyed in fee all of the

property known as the 'canal property,' including its banks, as it existed at the time of the conveyance; and at the time of the Act of 1887, and of the conveyance made thereunder, the canal property covered the land upon which the defendant's works are erected.

"Plaintiff acquired its rights under the Act of 1887. It is not the grantor of anything to the State, but the State has reserved out of its grant 500 horse power of water power, and that much plaintiff did not purchase. The whole question turns on the reserved right of the State. The defendant holds a lease from the State, and the contract made by defendant with the Board of Directors of the State Penitentiary, approved and ratified by the State, has given to the defendant all of the rights which the State had in that 500 horse power. In the Act of 1887 there is a distinct reservation of an absolute right to the State of 500 horse power of water power. Call it an easement, or what you will, it is absolute. Now, can the State dispose of it? Unquestionably she can. She can develop it; she can erect the necessary buildings for its utilization, and can utilize it. She may do it in any way she pleases. She may use old wheels, or she may use new and improved methods, and may resort to electricity, which is now generally regarded as an improved method of transmitting water power; therefore, there is no objection to the electric plant erected by the defendant under its contract with the State.

"Now, can the State lease its power, and permit the lessee to use it, and supply the State at the cost of the lessee? I think it can. The State is not always ready for carrying on such work; therefore, she could lease it; and, in this particular case, the State gets, or may get, 100 horse power and the lessee the balance. This being a consideration moving to the lessee, the lessee can devote that consideration to its own use; therefore, under the Act, the defendant, as lessee of the State, has the unquestionable right to put the electric plant on the

banks of the canal of the Penitentiary and to carry out the contract which has been made between it and the State of South Carolina.

"Now, has the defendant the supplementary right to put in a steam plant? Prudence and foresight justifies its erection on the banks of a canal along a river where freshets come; and where time is important, there might be serious interruption to the industries of the defendant company, and thus of the Penitentiary; therefore, the defendant has a right to use so much steam plant as is necessary to supplement its water power at such times as the water power is unavailable by reason of freshets or necessary repairs to the canal, or other causes. The dam may break, rains may swell the river, and there might be a long interruption to the use of the water power, and it would be necessary to resort to the steam plant to carry on the work. It is common to use steam as an adjunct to water power plants. The defendant cannot erect any more steam plant than is necessary for it to use as a supplement to the water power which it has received from the State.

"I, therefore, hold that there has been no violation of the State's contract with the plaintiff. That reservation of the State's water power is a part of the contract made with the plaintiff, and that reservation is absolute. Therefore, I hold that the complaint must be dismissed.

"It is, therefore, ordered and adjudged that the complaint be dismissed. J. H. HUDSON,

"November 11, 1893. Presiding Judge."

An appeal from this Decree was duly taken to the Supreme Court, the Court of last resort in the State of South Carolina, where the judgment of the Court below was affirmed, in an opinion containing the following language, to wit:

"Having reached the conclusion that the State is not an indispensable party in determining this cause of action, the next question for consideration is, whether or not the contract be-

tween the State and the defendant, relative to the 500 horse power of water power, is null and void. This contract received legislative construction when it was ratified by the Act of the Legislature hereinbefore mentioned, and although such construction is not binding on this Court, still it shows the intention of the State when it reserved the 500 horse power of water power. We think the construction placed upon said contract in 1892 by the Legislature as to the 500 horse power reserved to the State, was in harmony with the terms of said contract—the proviso to section 7 of the Act of 1887 being that the right of the State to the free use of the said 500 horse power should be absolute. The use of the word 'absolute' was for the purpose of creating a right in the State to this 500 horse power, separable and distinct from ownership in other lands, and not dependent upon any particular lands to which it may be appurtenant. This reservation was a right of profit a prendre."

The opinion then quotes at length from the language of Campbell, Chief Justice, in Hall vs. City of Ionia, 38 Mich., 423, and of Foster, J., in Goodrich vs. Burbank, 12 Allen, 459, and proceeds:

"The following authorities will also throw light upon this subject: Tinicum Fishing Co. vs. Carter, 61 Penn. St., 39; 19 Am. & Eng. Enc. Law, 259; Gould on Waters, section 299, p. 562; Poull vs. Mockley, 33 Wisc., 482; Washburn's Easements & Servitudes, sections 12, 12a; Angell on Watercourses, section 143. We are of opinion that the contract between the State and the defendant was not null and void.

"It is contended that said contract did not confer upon the defendant the right to erect the steam plant. This depended upon the fact whether it was merely incidental to, and essential to, the enjoyment of the use of the water power plant. The parties of the action had the right of trial by jury as to the legal issues raised by the pleadings, but neither a demand

was made therefor on Circuit, nor is there an exception raising such question. This Court must assume that the Circuit Judge properly decided all questions of fact upon which his judgment had necessarily to rest. Even if there was error on his part in his findings of fact, it is not the subject of review by this Court in a law case. This Court, therefore, cannot review the testimony for the purpose of determining whether or not the steam plant was merely incidental to the water power plant, and essential to the enjoyment of its use. For the same reason we cannot review his Honor's finding of fact, in effect, that the plaintiff is owner in fee of the land described in the complaint, subject to the right of the State to the 500 horse power of water power.

"These views render it unnecessary to decide specifically the other exceptions herein.

"It is the judgment of this Court, that, for the reasons herein set forth, the judgment of the Circuit Court be affirmed."

See 43 S. C., 169.

The Plaintiff in Error bases its assignment of Errors upon a single ground, as follows, to wit:

"That error was committed in deciding in favor of the validity of the contract between the defendant and the Board of Directors of the South Carolina Penitentiary, May 26, 1892, and the Act of the General Assembly of the State of South Carolina, December 24, 1892, ratifying and confirming the same, which were drawn in question, on the ground of their being repugnant to the Constitution of the United States of America in this, that they impaired the obligation of the contract made with the State of South Carolina, December 24, 1887, as to the rights, franchises and privileges of the plaintiff as the owner in fee of the property known as 'The Columbia Canal,' and more especially as to the plaintiff's sole and exclusive right, franchise and privilege to sell and lease the

water power developed by said canal, and as to the 500 horse power of water power to be furnished to the said State, and in this that they deprived the plaintiff of its property without due process of law."

GROUNDS OF MOTION.

I.

Defendant in Error submits that the judgment of the Supreme Court of the State of South Carolina, based upon a construction of the Act of 1887, under which both parties claim involved no Federal question and that this Court has no jurisdiction of the cause.

II.

Defendant in Error also submits that although the record may show that this Court has jurisdiction, it is manifest that the Writ of Error was sued out for delay only, and that the question on which the jurisdiction depends is so frivolous as not to need further argument.

ARGUMENT.

It is settled beyond controversy by an unbroken line of decisions of this Court that "if it appear either that the decision of the State Court was made upon rules of general jurisprudence, or that the case was disposed of upon other grounds broad enough in themselves to sustain the judgment without considering the Federal question, and that such question was not necessarily involved, the jurisdiction of this Court will not attach." City of New Orleans vs. New Orleans Water Works Co., 142 U. S., 79. And in the same case it was ruled that "Before this Court can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment." See

also Hammond et al. vs. Johnston, Rec., 142, U. S., 73, and Beaupre vs. Noyes, 138 U. S. 397.

Testing the case at bar by this rule, what do we find? That the Supreme Court of South Carolina did not pass upon the Act of 1892, under which the Federal question is sought to be raised, at all, but based its decision solely upon the Act of 1887, under which both parties claimed. It held that when the Legislature by section 7 of that Act provided that the Trustees should "furnish to the State, free of charge, on the line of the canal, 500 horse power of water power. * * * Provided, the right of the State to free use of said 500 horse power shall be absolute, and any mortgage, assignment or other transfer of the said canal by the Board of Trustees, or their assigns, shall always be subject to this right," it meant that the right should be absolute, and that the Board of Trustees could never transfer any interest in the canal which would prevent the State from disposing of that reserved right as it saw fit; and, of course, the Plaintiff in Error, in its purchase from the Board of Trustees, can show no contract or right as to the 500 horse power so reserved entitled to the protection of the Federal Constitution. So far from the Court basing its decision upon the Act of 1892, that Act was only incidentally mentioned, and the Court clearly indicated that it did not consider that it had any effect upon any right which the Plaintiff in Error had at the time of its passage.

JOHN T. SLOAN,
WM. H. LYLES,
Counsel for Defendant in Error.

No. 317.

APR 15 1898
JAMES H. McKENNEY,
CLERK

BRIEF OF ARGUMENT OF WM. H. LYLES FOR DEFENDANT IN ERROR.

Brief of Lyles for D. C.

Filed April 15, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 317.

THE COLUMBIA WATER POWER COMPANY,
Plaintiff in Error,

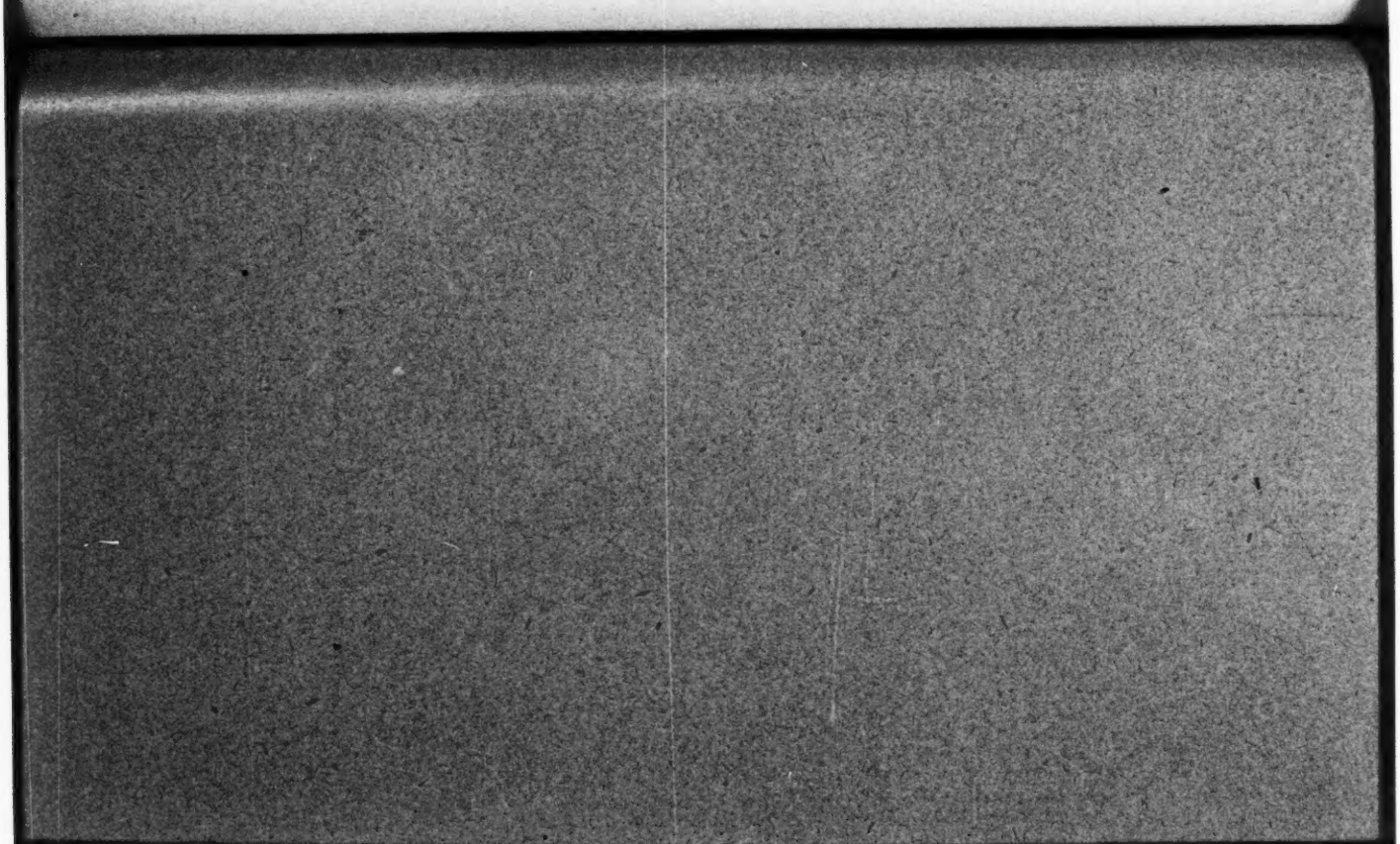
vs.

THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of South Carolina.

RECORD FILED MARCH 8th, 1897.

(16,508.)



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ABSTRACT OF CASE.

The questions involved in this case are two:

1. Whether the defendant in error had the right to erect a steam plant on or near the banks of the Columbia canal as a necessary adjunct to a water power plant there erected by it.

2. Whether it has the right to make use of 500 horse power of water power reserved by the State of South Carolina and developed by the defendant corporation under a contract with the State.

The following are the facts:

The plaintiff in error relies upon the act of 1887, but it alleges in its complaint that it recognized and admitted the right of the State to the use of the 500 horse power of water power for the purposes of the penitentiary, and the right of the defendant to erect the works in question so far as they were intended to develop the water power itself. The only questions, then, which presented themselves upon the merits of the case for consideration in the courts below are those stated above.

The works erected by the defendant as a power station are located on the north side of Blanding street in the city of Columbia, between the canal and Congaree river, opposite the wall around the penitentiary grounds, upon land originally purchased from Thomas J. Rawls by the State of South Carolina, October 18th, 1866, for the use of the penitentiary. This land is within the boundaries described in the Act of the General Assembly of the State of South Carolina, approved February 9th, 1882, 17 Stats., 873, as "All that tract of land measuring and containing about forty-five acres, and lying between the canal and the Congaree river, and between Neagle's bridge and Broad River bridge, together with certain small islands adjacent thereto." The State had previously acquired from Elisha Daniels, a former owner of the Rawls land, for the purposes of the Columbia canal, a strip of land forty feet wide measured each way from the centre line of the canal as it then existed, through the land afterwards conveyed by Rawls to the State, but this

strip did not touch the site of the works in question, the subsequent widening of the canal having taken up more than the original eighty feet. The works, however, did touch the outer side of the bank of the widened canal, near where the machine shops and grist mill of the penitentiary stood upon the banks of the old canal. The balance of the forty-five acres described in the act of 1882 was acquired by the State of South Carolina in connection with the Columbia canal under the Sullivan Fenner contract and deeds from other parties. One or two sales or contracts for sale of the Columbia canal had been made by the State of South Carolina, but the property had been reconveyed and on the 24th day of December, 1887, the State of South Carolina was the owner of the canal and its appurtenances, and it was then, and had been since 1882, in the custody of the board of directors of the South Carolina penitentiary for purposes of development, work having proceeded continuously from 1882 up to that date by convict labor and appropriations from the State Treasury. By an Act of the General Assembly, approved on that date, 19 Stats., 1090, entitled "An Act to incorporate the board of trustees of the Columbia canal, to transfer to said board the Columbia canal with the lands now held therewith, and its appurtenances, and to develop the same," the canal was transferred to the board of trustees thereby created. And by an Act approved December 24th, 1890, 20 Stats., page 967, the board of trustees were authorized to sell the property, subject to certain limitations and conditions. On the 11th of January, 1892, the board of trustees so created by the aforesaid Act, pursuant to its provisions, conveyed the canal and its appurtenances to the plaintiff in error. On the 26th day of May, 1892, the board of directors of the South Carolina penitentiary entered into a contract with the defendant in error, under which the works referred to were erected. Abstracts of these Acts of the General Assembly and the contract with defendant corporation are fully set forth in the "Abstract of Case" in the brief of argument for the de-

fendant in error on the motion in this cause to dismiss the writ of error or affirm the judgment of the court below. That motion, under the order of the court, is to be heard in connection with this argument, and reference is craved to the abstract of the case there given.

ARGUMENT.

The two questions which are stated in the beginning of the "Abstract of Case" will now be considered:

I.

Did defendant have the right to place its steam plant where it is as an adjunct to its water wheels? This inquiry again divides itself into two heads:

A. Did the plaintiff in error acquire title in fee to the land in question by the conveyance of the canal?

B. If so, did not the reserved right of the State, conceded by the plaintiff in its complaint, to erect the water station carry with it the right to erect the steam plant as a necessary adjunct?

A.

We submit that the plaintiff did not acquire title in fee to the lands in question.

It will be observed that in the decree of the State Circuit court the judge held: "As to the Rawls deed, that deed conveys the property to the State; but subsequently the State conveyed the canal property to the plaintiff, and thereby conveyed in fee all the property known as the canal property, including its banks as it existed at the time of the conveyance and at the time of the Act of 1887 and of the conveyances made thereunder. The canal property covered the land upon which defendant's works are erected." But defendant in error, who was respondent in the State supreme court, gave notice under the rules governing the practice in those courts, that it would in

the supreme court urge the error in that regard as an additional ground why the order of the circuit court dismissing the complaint should be affirmed.

In the opinion of the Supreme Court, delivered by Associate Justice Gary, it is said: "Even if there was error on his part in his findings of fact, it is not the subject of review by this court in a law case. The court, therefore, cannot review the testimony for the purpose of determining whether or not the steam plant was merely incidental to the water power plant, and essential to the enjoyment of its use. For the same reason we cannot review his Honor's findings of fact that the plaintiff is owner in fee of the land described in the complaint, subject to the right of the State to the five hundred horse power of water power." But the chief justice of that court concurred in the result in the following words: "I concur in the result, as I am not satisfied that the plaintiff ever acquired title to the land upon which the works in question have been erected, for this does not depend solely upon the solution of a question of fact, as seems to be supposed." And the other associate justice, Pope, simply concurred in the result.

Counsel for the plaintiff in error, in his argument against the motion to dismiss or affirm, has taken the ground, and will doubtless again take it in his argument on the main issues, that this court is precluded from the consideration of this question by the decision of the State Supreme court upon the matter. We respectfully submit that it is not.

The writ of error has been sued out from this court to the State court to bring the entire record before the court for a full review as to questions of law, not only of the judgment of the State Supreme court, but also the judgment of the Circuit court.

The writ has been granted upon the allegation that the contractural relation exists between the State of South Carolina and the plaintiff in error under the Act of 1887, and this court is called upon to determine whether a contract does exist under that act, what its terms are, and whether it has been violated

by any subsequent Acts of the State Legislature. Therefore, this court is compelled to determine what rights the plaintiff in error did acquire under the Act of 1887? and amongst other questions whether it acquired title in fee to the lands lying between the canal and the river, or whether in the purchase of the canal it acquired simply an easement of the lands covered by the canal and its banks.

In the case of *Eagan* vs. *Hart*, 165 U. S., 188, this court ruled, as it had done in many other cases, "that on error to a State court, this court cannot re-examine the evidence, and when the facts are found below, is precluded by such findings."

It is quite evident that Justice Gary of the State Supreme court conceived the question of the character of plaintiff's title to be one of fact, while Chief Justice McIver conceived it to be one of law, and we think a fair inference is that Justice Pope was of the same opinion. If a question of fact, this court is precluded from its consideration, but it is not precluded by even a unanimous opinion of the State Supreme court that it was a question of fact and not one of law. We submit, there being no dispute as to location or boundaries, and it being a question solely to be determined by public acts of the State Legislature, it is one of law, and not of fact. The only finding of fact in the Circuit court decree was that the works are located on the land covered by the Rawls deed; the Rawls deed called for the Congaree river as its western boundary, consequently running *ad medium filum aquae*, and it will be found from an examination of the Acts of the Legislature upon the subject that it was not intended that any lands in the neighborhood in question should pass with the canal, even if originally acquired for the purposes thereof.

The Columbia canal and its appurtenances was first sold by the State under the Act approved September 21st, 1868, 14 Stats., page 83; but the provisions of that Act are not important for consideration at this time, as the State re-acquired the possession of the canal in 1878, under a contract made with Sullivan

Fenner by commissioners appointed pursuant to the provisions of the A. A., approved March 12th, 1878, 16 Stats., 444.

"THE STATE OF SOUTH CAROLINA.

This agreement between the Columbia Canal Commission, appointed in accordance with the provisions of the Act of the General Assembly, No. 412, approved March 12, 1878, of the first part, and Sullivan Fenner, as assignee and grantee of the Columbia Water Power Company, of the second part, witnesseth, that the said commission, for itself, and Sullivan Fenner, for himself, his heirs, executors, administrators and assigns, do hereby *mutually covenant and agree*:

1. The said Sullivan Fenner to give immediate possession of the Columbia canal, with its appurtenances and the Lynch property adjacent thereto.

The water power of the canal now used in supplying the city of Columbia with water not to be interfered with by the commission, except that the said water may be temporarily interfered with when it is deemed necessary in the development of the canal, in the opinion of the engineer in charge, approved by the commission, and after five days' notice to the corporate authorities of the city of Columbia.

2. The said Sullivan Fenner covenants to execute a warranty title to the State of the aforesaid Lynch property, and, if desired, also to execute a quit claim deed to the said canal and its appurtenances, on being furnished, subject to the terms of the aforesaid Act, with five hundred horse power of water power at Gervais street, for the use of himself, his heirs, executors and assigns.

3. The said Sullivan Fenner to be furnished, for the use of himself, his heirs, executors and assigns, with water power (when developed) at his sites below Gervais street, upon the same terms with other parties, with the right to use the canal and banks adjacent to said sites for purposes connected with the use of the water power furnished and manufacturing pur-

poses at said sites, and with authority, if desired, to widen at his own expense the canal eastward below Gervais street opposite said sites.

In witness whereof, the said commission, by the chairman, under his private seal, attested by the secretary of the said commission, and the said Sullivan Fenner, under his seal, have hereto set and subscribed their names at Columbia, South Carolina, this 25th day of September, A. D. 1878.

THE CANAL COMMISSION,
Per R. L. McCaughrin, Chairman, (L. S.)
SULLIVAN FENNER, (L. S.)
Per S. W. Pearce, Jr., Attorney in Fact.

Attest: John C. Haskell, Secretary.

Signed, sealed and mutually delivered in duplicate before us.

(Signed.) JAMES T. WELLS,
JAMES R. RION.

Under this contract it will be seen that the State not only reacquired the canal and its appurtenances which had been conveyed to Pearce, trustee, but also acquired the Lynch lands, which was a body of land lying between Gervais street, of the city of Columbia, on the south, and the Elisha Daniels, or Rawls, land occupied by the penitentiary, on the north, and between the canal on the east and the river on the west, embracing besides a strip of the main land, several small islands in the Congaree river.

The State continued to hold this property by its commissioners appointed under the Act of 1878 until, under the provisions of the A. A., approved December 28th, 1879,17 Stats., 87, the canal itself was sold to David W. Thompson and Augustus F. Neagle, and that Act it is important for the Court to consider. It provides: "That the said canal commission shall, and they are hereby, authorized to enter into a covenant and agreement on the part and behalf of the State with David M. Thompson and Augustus F. Neagle, their heirs and assigns, to sell and dispose of the property of the State known as the Columbia

canal, with a view to the development thereof, together with the lands held therewith, and all and singular the rights, members and appurtenances thereunto belonging, *except the land along the canal between the head of the Congaree river and the south side of Gervais street, between which points all necessary rights of way for widening and deepening canal, with all roadways necessary on both sides of said canal, shall be granted.*"* * * *

Sec. 3. * * * and the right is hereby granted to widen and deepen the said canal, and change the course thereof in such manner as the said parties may consider necessary for the better development of the said water power.

Sec. 4. That the said parties, their heirs and assigns, shall have *the right of way*, and the same is hereby granted, in and along the said canal, for the construction and operation of the same from the head of the Congaree river, and at all points below Gervais street on the Lexington shore, and on Broad river to the head of the old canal; where any property lying along the said canal or canals shall be held as the private property of any person, the said parties, their heirs and assigns, for the sake of the public improvement contemplated in the construction of the said canal or canals, and the better navigation of the said Congaree and Broad rivers, and the transportation of supplies to market, shall have the right to acquire such rights of way by condemnation and assessment for the uses aforesaid in the same manner as rights of way may by law be now acquired by railroads."

It is clear, under the provisions of this act, that Thompson and Neagle acquired no interest in the land along the canal between the head of the Congaree river and the south side of Gervais street, but only "such rights of way for widening and deepening the canal, with all roadways necessary on both sides of the canal." The custody of the lands thus excepted from the grant, was not in the act or elsewhere specially provided for, and, therefore, under Sec. 60 of the General Statutes of 1882, passed into the custody of the Commissioners of the

Sinking Fund and became clearly separated from the canal itself. That section provides:

"Section 60. The Secretary of State shall take charge of all property of the State, the care and custody of which is not otherwise provided for by law. He shall hold the same subject to the direction and instruction of the Commissioners of the Sinking Fund * * *."

By the Act of the General Assembly, approved 9th February, 1882, 17 Stats., 855, it was provided: "That the canal commission * * * be, and they are hereby authorized and directed to transfer and deliver to the Board of Directors of the South Carolina penitentiary the property known as the Columbia canal, together with the lands *held therewith*, and all and singular the rights, members and appurtenances thereto belonging, which was acquired under and by virtue of the act above entitled, and the *contract by them entered into with Sullivan Fenner in pursuance of said act*, on the 25th day of September, A. D. 1878: *Provided*, That nothing herein contained shall authorize any action by the canal commission until a release has been executed to the State of all the right, title and interest in the *property above described* of Messrs. Thompson & Neagle or of any other parties holding any interest therein.

"Sec. 2. That the said board of directors are hereby authorized and directed, on behalf of the State, to take into their possession the said property, with its appurtenances; and for the purpose of providing *an adequate water power for the use of the penitentiary, and for the other purposes to be hereinafter named*, they are authorized, empowered and directed to improve and develop the same."

* * * * * * * * * * *

"Sec. 4. That the said *board of directors shall have the right of way*, and the same is hereby granted, in and along the said canal, for the *construction* and *operation of the same*; and if, in enlarging and developing the said canal, or in constructing the said dam, it become necessary to use the private property of any

person or corporation for that purpose, the said board of directors, for the sake of the public improvement contemplated in the construction of the said canal, and the better navigation of the said Broad and Congaree rivers, and the transportation of supplies to market, shall have the right to acquire such right of way in manner now provided by law."

On the same day, by A. A., 17 Stats., 873, it was provided: "That the commissioners of the Sinking Fund be, and they are hereby, authorized and directed to transfer to the board of directors of the State penitentiary all *that tract of land measuring and containing about forty-five acres, and lying between the canal and the Congaree river, and between Neagle's bridge and Broad River bridge, together with certain small islands adjacent thereto, and to put them in possession of the same.*

Sec. 2. That the said tract of land shall be *used* by the said board of directors of the State Penitentiary for such *purposes incident* to the *maintenance* and development of the State penitentiary as they may deem proper."

This was the land which it is seen above had been separated from the canal in part, upon the conveyance to Thompson & Neagle, and included in its description is the land now in question. It is clear that the board of directors of the penitentiary, although, under the provisions of the two acts, which, being on their passage through the Legislature at the same time, must be construed together, they would be custodians of the lands thus separated from the canal, as well as of the canal and its appurtenances, were custodians in different rights; they held the canal and its appurtenances for development; they held the lands described for the maintenance and development of the State penitentiary; in their custody of the canal, having only the right of way, for the construction and operation of the canal, through the lands held for the uses of the penitentiary.

By A. A., approved December 24, 1887, 19 Stats., 1090, the board of directors were required to transfer to the board of trustees of the Columbia canal, not the penitentiary or

any lands held by the board for the use thereof, but only "the property known as the Columbia canal, together with the *lands now held therewith,* acquired under the Acts of the Legislature of this State with reference thereto or otherwise." And the board of directors subsequently deeded the property to the board of trustees, using the descriptive terms provided in the Act. By that deed, then, only such lands passed as were covered by both elements of the description—that is to say, lands that had been acquired for the purposes of the canal, either under the A. A. or by contract, as for instance, the contract with Sullivan Fenner, and which were, at the time of the passage of that Act, *still* held with the canal as appurtenant thereto. Now, at the time of the passage of that act, we have seen that the lands in question first had never been acquired for the *purposes of the canal,* nor were they then *held in connection therewith,* but had been acquired and were then held for the *purposes* of the penitentiary. So they no more passed under that deed to the board of trustees than did the land upon which the buildings and walls of the penitentiary itself are located, and the land still remains the property of the State of South Carolina. By Section 4 of the Act it was provided that "the said board of trustees *shall have the right of way,* and the same is hereby granted, in and *along said course of the canal, for the construction and operation of the same,*" and by the grant of the canal only an easement in the lands passed.

The subsequent A. A., approved December 23, 1890, simply authorizes the board of trustees to sell the canal with the land which had been conveyed to it by the board of directors before the completion of the canal, and is not important for consideration as to what land passed with the canal.

It is needless for us to say that this action is based upon an allegation of seizing in fee by the plaintiff of the lands in question, and cannot be maintained by proof only of an easement, for in the latter case the question would be whether there

had been any obstruction of the user of the easement, not whether there had been any trespass upon plaintiff's lands.

B.

However, if this court shall differ with us as to this point our second query is, did not the reserved right of the State, conceded by the plaintiff in its complaint, to erect the water station, carry with it the right to erect the steam plant as a necessary adjunct? It was so held by his Honor, the presiding judge, who found as a matter of fact: "Now, has the defendant the supplementary right to put in a steam plant? Prudence and foresight justifies its erection on the banks of a canal along a river where freshets come; and where time is important there might be serious interruption to the industries of the defendant company, and thus of the penitentiary; therefore, the defendant has a right to use so much steam plant as is necessary to supplement its water power at such times as the water power is unavailable by reason of freshets or necessary repairs to the canal, or other causes. The dam may break, rains may swell the river, and there might be a long interruption of the use of the water power, and it would be necessary to resort to the steam plant to carry on the work. It is common to use steam as an adjunct to water power plants. The defendant cannot erect any more steam plant than is necessary for it to use as a supplement to the water power which it has received from the State."

In its complaint plaintiff alleges, paragraph II, "That subsequent to said notification the defendant, acting as the duly authorized agent of the State, through the board of directors of the penitentiary, submitted specifications and plans for the construction and erection of a plant or works for obtaining, or producing, or making available the said water power, and the plaintiff did approve the same, as not taking more or less embankment of land than was necessary for the development or obtaining the five hundred horse power of water power

for the use of the State, and did allow the defendant, as the agent of the said State, to proceed with said work, for the purpose of developing the said water power, as it was the intention, purpose and desire of the plaintiff to perform all of the conditions, obligations and terms of the said Act of the General Assembly of the State of South Carolina authorizing the sale of the said property, as it is its purpose and desire now to do; and, as plaintiff is informed, said work and construction was carried on and conducted, on behalf of the State, to its completion, in accordance with the plans and specifications as submitted."

The State Supreme Court held, "It is contended that said contract did not confer upon the defendant the right to erect the steam plant. This depended upon the fact whether it was merely incidental to and essential to the enjoyment of the use of the water power plant. The parties to the action had the right of trial by jury as to the legal issues raised by the pleadings, but neither a demand was made therefor on circuit, nor was there an exception raising such question. This court must assume that the Circuit Judge properly decided all questions of fact upon which his judgment had necessarily to rest. Even if there was error on his part, in his findings of fact, it is not the subject of review by this court in a law case. This court, therefore, cannot review the testimony for the purpose of determining whether or not the steam plant was merely incidental to the water power plant and essential to the enjoyment of its use."

II.

Is the defendant making an improper use of the water power reserved by the State? We say that it is not. We think that the whole question is to be determined by the construction of the A. A. of December 24, 1887, 19 Stats., 1,090, above referred to, and his Honor, the Circuit Judge, was of the same opinion.

By that Act it will be seen that the State was transferring from herself to the board of trustees of the Columbia canal for the benefit of the city of Columbia a most valuable property, without any consideration whatever, except the use of the water power, which was reserved under the provisions of the act, which are as follows:

"Sec. 2. That the said board of trustees are hereby authorized and directed, for the development of the said canal, to take into their possession the said property with all its appurtenances; and for the purpose of navigation, for providing an *adequate water power for the use of the penitentiary,* and for *other purposes* hereinafter named, they are hereby authorized, empowered and directed to improve and develop the same. * * *

Sec. 7. That the board of trustees shall, within two years from the ratification of this act, complete the said canal so as to carry a body of water 150 wide at the top, 110 feet wide at the bottom, and 10 feet deep, from the source of the canal down to Gervais street, and furnish *to the State, free of charge, on the line of the canal, 500 horse power of water power,* to Sullivan Fenner or assigns 500 horse power of water power, under his contract with the canal commission, and to furnish the city of Columbia 500 horse power water power at any point between the source of the canal and Gervais street the city may select; and shall, as soon as it is practicable, complete the canal down to the Congaree river, a few yards above the mouth of Rocky branch, *Provided, that the right of the State to the free use of the said 500 horse power shall be absolute, and any mortgage, assignment, or other transfer of the said canal by the said board of trustees or their assigns shall always be subject to this right.*

"Sec. 8. That in order to secure and aid the speedy completion of the canal, from its source to Gervais street, *for furnishing the said water power to the State* and to the city of Columbia, the board of directors of the South Carolina penitentiary shall furnish to the order of the said board of trustees such convicts as may, from time to time, be in the penitentiary unemployed

and not under contract, and are now allowed by law to be employed or worked outside of the walls of the penitentiary."

In *Slidell* v. *Grandjean*, 111 U. S., at page 329 (L. C. P. Ed.), the rule applicable to the construction of this act is thus laid down: "It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the government rather than that of the individual. Nothing can be inferred against the State. As a reason for this rule it is often stated that such acts are usually drawn by interested parties; and they are presumed to claim all they are entitled to. The rule has been adopted and followed by this court in many instances in the construction of statutes of this description. *Charles River Bridge Co.* v. *Warren River Bridge*, 11 Pet., 536; *R. R. Co.* v. *Litchfield*, 23 How., 88 (64 U. S., XVI, 509); *the Delaware Railroad Tax*, 18 Wall., 206 (85 U. S., XXI, 888). The rule is a wise one; it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act and thus sanctions only open dealing with legislative bodies."

In the case of *Grant* v. *Leach*, 20 La. An., 329, s. c. 96 Am. Dec., 403, it was ruled: "Reasonable doubts as to proper construction of legislative grants are to be resolved in favor of the State, and if it is susceptible of two meanings, that construction is to be adopted which works least harm to the State." See the same ruling by this court in *Chicago Bridge Co.* vs. *Binghampton Bridge Co.*, 3 Wallace, 51.

Especially is this true when the consideration reserved is a merely nominal one. The act we are now considering must be construed as constituting a power of attorney prescribing the conditions upon which the board of directors of the penitentiary, a public board, were to transfer the property to the board of trustees of the Columbia canal, a quasi public board. Unless

its provisions were capable of being performed, and were actually performed, there was no power in the board of directors to make the transfer. Its provisions constituted conditions precedent to the transfer of the property, and were to be liberally construed, not strictly, as with conditions subsequent. In other words, if the board of directors of the penitentiary could not, and did not, reserve to the State of South Carolina, "*free of charge on the line of the canal, 500 horse power of water power,*" and if that obligation was not imposed upon the board of trustees, by section 7 of the act itself, then the board of directors had no authority, under the act, to transfer the title of the property. The State has indicated her purpose of having the 500 horse power free of charge, and also "that the right of the State to the *free use* of said 500 horse power shall be *absolute* and any mortgage, assignment, or other transfer of the said canal by the said board of trustees, or their assigns, shall always be subject to this right," a qualification attaching to every transfer that was made. If an individual should give to another a power of attorney to transfer an estate upon condition that the attorney should reserve to him the use of a stream of water upon such terms as would indicate, without question, his intention to have an easement, or a right in gross, of an inheritable character, and the attorney could not draft a conveyance by which such purpose could be accomplished, then the power of conveying the estate would not become operative. It is given him to perform an act only upon the performance of a condition precedent, and if the condition precedent is, or becomes impossible, the power itself falls to the ground.

Moreover, the board of trustees were a quasi public body, upon whom duties to the public were imposed. It was made their duty, not a matter of discretion, to complete the canal, and likewise to furnish the water power to the State and the other parties named in the Act. This was a duty which could have been enforced against them by the public, and a wilful failure to perform would have subjected them to indictment. Now,

by the act authorizing the board to make the sale under which plaintiff claims, the purchaser was to take the property subject, not to easements and water rights reserved, but "*subject to all the duties and liabilities*" imposed by the act constituting the board, amongst them the public duty of furnishing to the State the 500 horse power of water power, which duty would be enforcable by indictment or mandamus. The argument of counsel for appellant as to the rights of dominant and servient tenements have no application to the case.

When, therefore, the State declared in the Act of 1887 that her right to the use of the 500 horse power should be absolute she clearly meant to reserve the right to dispose of it as she pleased.

"Absolute," says Rapalje & Lawrence (Law Dict.), "means complete, final, perfect, unconditional, unrestricted," as quoted and applied in *Fuller* vs. *Missroom*, 35 S. C., 330. In the Century Dictionary, vol. 1, p. 21, we read: "ABSOLUTE: 1. Free from every restriction; unconditional. * * * 2. Perfect; complete; entire; possessed as a quality in the highest degree." And then among the illustrations we have: "Absolute estate, in law, an unqualified, unconditional estate, entitling the owner to immediate and unlimited possession and dominion." In Worcester's Unabridged Dictionary we read: "ABSOLUTE: 1. Clear from other things; independent of anything else; perfect in itself; unrestricted; unlimited; complete."

Plaintiffs contended that this right of the State to water power is an incorporeal right—an easement for the penitentiary—that it cannot be assigned or leased. We reply, that if the canal had been completed in 1887, the Legislature would have reserved this water power to herself in the language of the act of 1879, but the canal was not completed, there was no water in it, and hence there was at that time no water power. The State parted with this valuable property on condition that the quasi public "board of trustees" would create this water power, and would, when it was created, turn over 500 horse

power of this water power, issuing out of the thing granted, to the State for its free and absolute use—not *for* the penitentiary, but *at* the penitentiary, for the use of the State. If it be an incorporeal right, it is not an easement reserved only for the penitentiary. It is the property of the State, and, therefore, the State can do with it as she pleases. She may use it as she uses her phosphate beds—receive a part made available in consideration of the other part being used by the grantee or lessee or license for his own purposes as his compensation. In short, if plaintiff is right in his contention, even then his position can be sustained only by giving to the word "absolute" the meaning of "perpetual," or some other definition so unusual as not to find any place in so high an authority as "Worcester's Unabridged Dictionary," in violation of the rule laid down in *Slidell* v. *Grandjean* 111 U. S., 437—if, indeed, there can be any doubt that "absolute" means "unconditional," "unlimited," "unrestricted."

The State of South Carolina owned the canal and her legislature had sovereign power to create new characters of estates or modify old ones and could make easements in gross inheritable or assignable. The canal itself was a quasi corporate or ideal thing, irrespective of its ownership, and was not held as an incident to an estate in lands, but all lands connected with it were held as an incident to it. Indeed, it was capable of existence and transfer independently of an estate of any character in a single foot of land. The value of the canal was the water power it was capable of furnishing and the reservation of a definite amount of water power was a reservation of a proportionate interest in the principal thing itself.

An incorporeal right if inheritable is an incorporeal hereditament; and the word "absolute" imports inheritance. *Fuller* v. *Missroom*, 35 S. C., 330, and cases there cited. We do not deem it necessary to go into the very nice learning which distinguishes a reservation from an exception, or whether this reservation or exception of water power, if an easement is an ease-

ment appurtenant or in gross; for whatever it be, the State has the absolute use of it, and may do with it as she pleases. If, however, there is any desire to pursue the investigation, a full discussion of it will be found in the cases of *Haggerty* v. *Lee*, 54 N. J. L., 580 (25 Atl. Rep., 319), and *Chaflin* v. *R. R. Co.*, 157 Mass., 489 (32 N. E. Rep., 659), and in a full note to these two cases as republished in 21 L. R. A., pps. 631-641. To accede to plaintiff's position would be to hold that the State, holding absolutely a property capable of developing 10,000 horse power of water power could not dispose of the greater part of it, and reserve a portion to herself, which reserved portion she could so use as to get the benefit of a part thereof without expense, by allowing another party to use the remainder of this reserved portion in providing the State with her needed part, and with a money income besides. It would be, to further hold that the State could not utilize the power of which she retained the absolute use, unless she expended herself a considerable sum of money in erecting a power plant; in other words, that she could not allow a use of her water power as compensation to one who would render such water power available to her. And that is all that has been done by the contract assailed in this case. The State has not sold her reserved water power, nor assigned it, nor even leased it out for a money consideration only; she has more properly contracted for its development by allowing only the use of part, so that she might receive the other part for her own purposes without expense, and for a money consideration besides.

But as matter of law, the right to use water as a generator of power is not always strictly an easement which is "a privilege or convenience which one neighbor has of another without profit," (Angell Water Courses, Sec. 142), but is the service *aquachaustus* of the civil law, or right of profit, or *profit a pendre* of the common law (Ibid., 143). As Judge Foster puts it, in *Goodrich* v. *Burbank*, 12 Allen, 459: "It seems to be held uniformly, that if enjoyed in connection with a certain estate, they

are regarded as easements appurtenant thereto; but if granted to one in gross, they are treated as an estate or interest in land, and may be assignable or inheritable." See several other cases cited in notes to section 143 of Angell.

On page 13 (x 10) of Washburn on Easements, the author says: "If the easement consists of the right of *profit a prendre*, such as taking soil, gravel, minerals and the like from another's land, it is so far of the character of an estate or interest in the land itself, that if granted to one in gross it is treated as an estate and may, therefore, be one for life or inheritance. But if it is an easement proper, such as a right of way and the like, and is granted in gross, it is a mere personal interest and is not inheritable." And in a note the author says: "The above positions are approved by Sharswood, J., in *Tinicum Fishing Co.* v. *Carter*, 61 Penn. St., 39." Mr. Washburn pursues this subject through four pages and cites and quotes from several cases in support of his proposition, that a grant of the right to use water to one in gross creates an estate that is assignable and inheritable. Thus in *Goodrich* v. *Burbank*, *supra*, the grant of a right to draw water from a spring on the land of grantor by means of an aqueduct was assignable. See, too, *Poull* v. *Moakley*, 33 Wisc., 482, "that an easement of a canal is assignable, though not appurtenant to any estate." And the language quoted from the court in *Hall* v. *Ionia*, 38 Mich., 493: "The value of water as a distinct inheritance has been recognized in all periods, and its ownership is well established as not dependent upon lands to which it may be appurtenant, but as having a separate and distinct importance." And from *Goodrich* v. *Burbank*: "We are unable to distinguish between the right to take water by a canal from a pond for the purposes of power, and the right to take it from a spring in a pipe for domestic purposes."

There is no difference in the law applicable to artificial channels through which a natural stream is diverted (as in the case

at bar) and to natural streams. *Dunklee* v. *R. R. Co.*, 24 N. H., 506; Angell Waterc., Sec. 540.

"*Profit a prendre* is a right to take either the fruit or products of the land of another, or the materials which constitute it. This right of *profit a prendre*, if enjoyed by reason of holding a certain other estate, is regarded in the light of an easement appurtenant to such estate. Where the right of *profit a prendre* belongs to an individual, distinct from ownership in other lands, it takes the character of an interest or estate in the land itself, rather than that of a proper easement, and may be held in fee, for life, or for years. *Profits a prendre* differ from easements, in that the former are rights of profit and the latter are mere rights of convenience without profit. But the principal distinction is between easements and *profits a prendre* in gross, the latter being held independently of any dominant estate, whereas for the existence of an easement, two estates, the dominant and servient, are necessary. *Profits a prendre* are acquired by grant or prescription, and never by custom." 19 Am. & Eng. Enc. of Law, p. 259. See, too, *Hall* v. *Ionia*, 38, Mich., 493, and especially pages 498-9; *Boist* v. *Empie*, 1 Selden, 33; *Owen* v. *Field*, 102 Mass., 107-8; *Amidon* v. *Harris*, 113 Mass., 63; *Hill* v. *Shorey*, 42 Vt., 614. See, too, Gould on Waters, Sec. 299, on page 562, where it is said: "So the privilege of laying pipes in another's land for the purpose of taking water and of entering upon the land to lay, repair or renew such pipes, is an interest in the realty which is assignable, descendable and devisable, when the grant contains words of inheritance." And in the case at bar these rights of entering, laying pipes and taking water have been conceded, and were rights reserved to the State by law. Angell Waterc., Sec. 158.

We cannot enforce this idea more forcibly than by quoting from the language of the State Supreme Court in this case. It says:

"Having reached the conclusion that the State is not an in-

dispensable party in determining this cause of action, the next question for consideration is whether or not the contract between the State and the defendant relative to the 500 horse power of water power is null and void.

"This contract received legislative consideration when it was ratified by the act of the legislature hereinbefore mentioned, and although such construction is not binding on this court, still it shows the intention of the State when it reserved the 500 horse power of water power.

"We think the construction placed upon said contract in 1892 by the Legislature as to the 500 horse power reserved to the State was in harmony with the terms of said contract, the provisions of Section 7 of the Act of 1887 being that the right of the State to the free use of the said 500 horse power should be absolute.

"The use of the word 'absolute' was for the purpose of creating a right in the State to this 500 horse power separable and distinct from the ownership of other lands and not dependent upon any particular land to which it may be appurtenant.

"This reservation was a right of *profit a prendre.* Campbell, C. J., in delivering the opinion of the Court in *Hall* v. *City of Ionia et al.*, 38 Mich., 423, says: 'There is no foundation for the claim that a right to the perpetual use of the water must be dependent upon a particular estate with which it is connected. Some confusion has, perhaps, been caused by an attempt among writers to create symmetry in the law by putting all rights connected with land or springing from them into classes, and by speaking of these particular rights as easements, which very commonly requires both a dominant and servient estate.

"But every right of property must usually have some peculiar qualities of its own, which must not be destroyed by inappropriate attempts to classify it with different kinds. The old maxim *omnis definitio periculosa* is especially true when things of essentially different qualities are placed together under one head.

"The value of water as a distinct inheritance, either for creating power or for other purposes of use or consumption, has been recognized in all periods, and its ownership is well established as not dependent on lands to which it may be appurtenant, but as having a separate and intrinsic importance.

"There may be an occasional dictum and possibly some decisions to the contrary; but most cases where any doubt seems raised on this question will be found to rest on peculiar facts which in no way involve the general doctrine. The facts are often such as to confine the use of water not only to special places, but also to specified purposes; but this limited use is the exception and not the rule,' citing a number of authorities. Proceeding, he says: 'Experience has shown that in many instances the right to use and dispose of water may not only be more valuable than any land which is occupied for its gathering and disposal, but it is also a special value to be taken to a distance and parcelled out among several users or occupants. Water works are only made available by the sale of water to consumers, and valuable water power is frequently distributed among several mills in large and small quantities and may not be used by the owner at all.

"The ownership of it cannot be confined to the right in the nature of a license, and is as well recognized a title or interest of a real nature as land itself, without some use of which it could not be made available.

"Foster, J., in speaking for the Court in *Goodrich* v. *Burbank*, 12 Allen, 459, uses this language: 'The water itself may not be the subject of property, but the right to make it and to have pipes laid in the soil of another for that purpose and to enter upon the land of another to lay, repair and renew such pipes is an interest in the realty assignable, descendible and devisable.' On this subject the language of Judge Curtis is as follows: 'I know of no rule of the common law which prohibits grants of the incorporeal right to divert water from being made in gross. If I have a spring, I may sell the right to take water

from it by pipes to one who does not own the land across which the pipes are to be carried, and I may either restrict the use to a particular house or not, as I please. It is true the grantee cannot make the grant useful without acquiring from the owner of the intermediate land the right to lay pipes therein, nor can he use the water in a house until he obtains the right to possess that house; but these may be acquired afterwards. Incorporeal rights may be inseparably annexed to a particular messuage or tract of land by the grant which creates them and makes them incapable of separate existence, but they may also be granted in gross, and afterwards, for purposes of enjoyment, be annexed to a messuage or land and again severed therefrom by a conveyance of the messuage or land without the right or a conveyance of the right without the lands.'

"*Lonsdale Co.* v. *Moiese*, 21 Law Rep., 664: * * * 'We are unable to distinguish between the right to take water by a canal from a pond for the purposes of power and the right to take it from a spring in a pipe for domestic purposes, watering of cattle, or to supply an artificial jet or fountain, and to sell it to any others for any uses they may desire to make of it.' "

The following authorities will also throw light upon the subject:

Tinicum Fishing Co. v. *Carter*, 61 Penn. St., 39.
19 Am. & Eng. Enc. of Law, p. 259.
Gould on Waters, Section 299, p. 562.
Poull v. *Mockley*, 33 Wis., 482.
Washburn's Easements & Servitudes, Section 12 and 17a.
Angell on Water Courses, Section 143.

We are of the opinion that the contract between the State and the defendant was not null and void.

Counsel for plaintiff, however, urge that the Legislature has indicated its purpose to reserve this 500 horse power for the use of the penitentiary. But it will be seen that the only mention of the penitentiary in connection with the use of the water power is found in Section 2, above quoted, where it is

said: "For the purposes of navigation, for providing an adequate water power for the use of the penitentiary *and for other purposes hereinafter named,* they are hereby authorized, empowered and directed to improve and develop the same." Then in Section 21 it is that the board of trustees "may sell or lease the power of the canal, subject to such rules and regulations as it shall prescribe, having first provided for the State with 500 horse power of water power at the penitentiary."

Now, there is nothing in either of these provisions to indicate that the use which the State was to make of the 500 horse power was to be measured by the necessities of the penitentiary. It is true that it was provided for the penitentiary and other purposes, and it was provided at the penitentiary, but the right of the State to its free use was still to be *absolute.*

We think this is the proper view of the act of 1887 when taken alone, but we think that the view is strengthened when we consider all the acts upon the subject of the canal as in *pari materia.* It will be observed that whenever the State was itself contemplating the continuous ownership of the canal and its development and utilization by its own agencies it provides only for the reservation of such water power as would be adequate for the uses of the penitentiary. But whenever she contemplated the transfer of the property to another, she provides for the absolute use for herself of a fixed and definite amount of water power. The A. A. of December 23d, 1879, 17 Stats., 87, contemplating a transfer of the property, provides:

"Section 5. That in consideration of the public improvement and general benefit aforesaid, and the use *by the State of fifteen hundred horse power of water power between the city water works and Senate street, to be used as hereinafter provided,* the city of Columbia is hereby authorized to enter into an obligation to hold the said parties, their heirs and assigns, harmless as against all damages done from the acquisition of all rights of way between the head of Congaree river and Gervais street, on the Columbia shore, and against the flowage of all low lands and

back water above the dam so to be constructed across the Congaree."

Then in Section 9 prescribes:

"Sec. 9. That the said parties, their heirs and assigns, in consideration of the rights and franchises herein granted, shall, within the period of three years from the date of said contract, complete the construction of the dam or dams and the bulkheads as hereinbefore provided and shall complete the canal or canals, from the said bulkheads down to the quarry situate upon what is known as the Kinsler tract, about seven-eighths of a mile below Gervais street, said canal on the Columbia shore to be so constructed as to develop 15,000 horse power, and they shall have in operation within the time aforesaid one cotton mill of 16,000 spindles, and *they shall* give to the State, between the Columbia Water works and Senate street, *fifteen hundred horse power of water power, to be used or disposed of in such manner and on such terms as the State may direct.*"

By the A. A. of February 9, 1882, 17 Stats., 855, however, where it was contemplated that the State should continue to own the canal, and that it should be developed by the board of directors of the penitentiary, it was provided in Section 2:

"Section 2. That said board of directors are hereby authorized and directed, on behalf of the State, to take into their possession the said property, with its appurtenances; and for the purpose of providing *an adequate water power for the use of the penitentiary, and for the other purposes to be hereinafter named,* they are authorized, empowered and directed to improve and develop the same."

And in Section 6 it is provided:

"Section 6. That the board of directors are authorized to furnish to the city of Columbia, for the purpose of operating its water works, and other purposes, five hundred horse power of water power; and to Sullivan Fenner, under his contract with the canal commission, five hundred horse power of water power; and after reserving for the use of the penitentiary a power

sufficient to meet the demands of its ordinary operations, and other industries conducted and carried on within its walls, they are further authorized, with the comptroller general, on behalf of the State to lease to other persons or corporations water power upon such terms and upon such annual rental per horse power as in their judgment may be proper; and also to lease such mill sites along the line of the said canal, as may be owned by the State, upon such terms as may be deemed most advantageous to the interest of the State."

Then, when the board of directors are authorized by the A. A. of December 24, 1887, 19 Stat., 1090, to transfer the property from the State, the language used by the Legislature recurs to an absolute reservation of a fixed amount of water power for the State, irrespective of the amount that might be required by the penitentiary, and says that it is to be "absolute." And, inasmuch as there was no express repeal of the A. A. of February 8th, 1882 (17 Stat., 855), the use that the State was to make of her water power so reserved was to be determined by reference to Section 6 of that Act, that is to say: "After reserving to the use of the penitentiary," out of said five hundred horse power "a power sufficient to meet the demands of its ordinary operations, and other industries conducted and carried on within its walls, they are further authorized, with the comptroller general, on behalf of the State, to lease to other persons or corporations water power," etc. This seems to have been the view of the board of directors of the penitentiary and the comptroller general in executing the contract with defendant. (See printed record, pp. 16-19).

Suppose, however, that the State contemplated a reservation of 500 horse power for the use of the penitentiary, is she to be restricted to any particular use by the penitentiary, and was it not competent for the board of directors of the penitentiary to contract for the development of the water power as it has done with the defendant in this case? How can it be said that it is any less a use of the penitentiary for the defendant to develop

the water power and use a part of it for its own purposes in consideration of the development, than it would be for the State herself, out of the funds appropriated for the penitentiary, to pay for its development? And could she not sell or lease the electric power developed thereby, as it now sells or leases its manufacturing power within the walls of the penitentiary itself? Is there anything in the law which prevents the board of directors from utilizing the convict labor in manufacturing outside of the walls of the penitentiary, or from selling the productions of its convicts? If not, certainly it cannot be said that there is anything which prevents them from selling or disposing of the products of its water power reserved for the purposes of the penitentiary in the shape of electric power developed. By what tribunal is it to be determined what are penitentiary uses? Is it not the Legislature? And has not this been determined by the A. A., approved December 24, 1892, 21 Stats., 94? See brief of argument for motion to dismiss or affirm, pp. 11-12 where the Act is quoted.

WM. H. LYLES,
Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1897.

No. 312.

THE COLUMBIA WATER POWER COMPANY,
Plaintiff in Error,

vs.

THE COLUMBIA ELECTRIC STREET RAILWAY LIGHT AND POWER COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of South Carolina, at Columbia, S. C.

BRIEF OF ARGUMENT OF WM. H. LYLES FOR MOTION TO DISMISS OR AFFIRM, IN REPLY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 317.

THE COLUMBIA WATER POWER COMPANY,
Plaintiff in Error,
vs.
THE COLUMBIA ELECTRIC STREET RAILWAY, LIGHT AND POWER COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of South Carolina, at Columbia, S. C.

The record shows that only two questions are presented in the State courts, to wit:

1. Whether the State of South Carolina, through her board of directors of the penitentiary, could make such a contract as was made with the defendant for the use of the five hundred horse power of water power reserved for the State under the Act of 1887.

2. If so, whether the reserved right of the State entitled the defendant to erect a steam plant on the banks of the canal as subsidiary to its water power plant.

No amount of argument can bring before the court any other question.

Plaintiff's complaint admitted the right of the State to the five hundred horse power of water power, and admitted the right of the defendant to erect its water power plant where it is. This being so, and the right of the defendant having been passed upon by the State courts simply upon a construction of the Act of 1887, it is respectfully submitted that it was simply the case of a junior and senior grant, and the plaintiff's right was decided only upon local laws.

In the *Missouri Pacific Rwy. Co* v. *State of Nebraska*, 164 U. S., 403, this Court has said:

"The Supreme Court of Nebraska has construed this statute as authorizing the board of transportation to make the order questioned in this case, which required the railroad company to grant to the relators the right to erect an elevator upon its right of way at Elmwood Station on the same terms and conditions on which it had already granted to other persons rights to erect two elevators thereon. The construction so given to the statute by the highest court of the State must be accepted by this court in judging whether the statute conforms to the constitution of the United States. *Chicago, M. & St. P. R. R. Co.* v. *Minnesota*, 134 U. S., 418, 458 (33-970), 3 Inters. Com. Rep., 209; *Illinois C. R. Co.* v. *Illinois*, 163 U. S., 142, 152, 41 L. Ed., 107-110."

In the case of *F. G. Oxley Stave Co.* v. *County of Butler*, 166 U. S., 649, the Court rules: "The validity of subscriptions by a county court to the stock of a railway company, and of a conveyance to that company, and the matter of fraud in a decree, are questions of local law or practice on which the judgment of a State court cannot be re-examined by this Court."

The very language of the State court in the case now under review indicates that it was in no way controlled by the Act of 1892. The Court here says (printed Record, page 31):

"This contract received legislative construction when it was ratified by the act of the legislature hereinbefore mentioned and although such construction is not binding on this Court, still it shows the intention of the State when it reserved the five hun-

dred horse power of water power. We think the construction placed upon said contract by the legislature as to the five hundred horse power of water power reserved to the State was in harmony of the terms of said contract, the proviso to Sec. 7 of the Act of 1887 being that the right of the State to the free use of the said five hundred horse power of water power would be absolute."

If this be true as to the right to the use of the water power itself, the question as to the right to erect a steam plant cannot be considered by this Court, for it is clear that that was a question of fact, and decided as such by the State courts, where it is said: "It is contended that said contract did not confer upon the defendant the right to erect a steam plant. This depended upon the fact whether it was merely incidental to and essential to the enjoyment and use of the water power plant. The parties to the action had the right of trial by jury as to the legal issues raised by the pleadings, but neither a demand was made therefor on circuit, nor was there an exception raising such question. This Court must assume the circuit judge properly decided all questions of fact upon which his judgment had necessarily to rest. Even if there was error on his part in his findings of fact, it is not the subject of review in this Court in a law case. This Court, then, cannot review the testimony for the purpose of determining whether or not the steam plant was merely incidental to the water power plant, and essential to the enjoyment of its use."

In *Egan* v. *Hart*, 165 U. S., 188, it is said, after reciting the facts decided by the Court below:

"Now, the foregoing findings by the trial court, approved and affirmed by the Supreme court of Louisiana, that is, the non-navigability of the stream, and the concurrent participation by the United States and the State in the building of the dam, are purely questions of fact, and, therefore, as we have said, are conclusive.

"It is clear that if these questions of fact are adequate to determine the controversy between the parties, and broad enough to maintain the judgment independent of any Federal question, that we are without jurisdiction, although the State court may have also decided such a question. *Eustis* v. *Bolles*, 150 U. S., 361 (37: 1111); *Connecticut, New York & N. E. R. Co.* v. *Woodruff*, 153 U. S., 689 (38: 869); *Hammond* v. *Connecticut Mut. F. Ins. Co.*, 150 U. S., 633 (37: 1206)."

WM. H. LYLES,
Counsel for Defendant in Error.

Statement of the Case.

munity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up and claimed by either party under such Constitution, statute, commission or authority, and in this class the Federal right, title, privilege or immunity must, with possibly some rare exceptions, be specially set up or claimed to give this court jurisdiction.

But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, if the Federal question appears in the record and was decided, or if such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here.

The provision in the act of the South Carolina legislature of December 24, 1887, that the right of the State to the five hundred horse power of water retained for the use of the penitentiary should be "absolute" authorized the leases of such portion thereof as was not required for the individual use of the penitentiary.

Whether the plaintiff had a legal title to the lands in question in this case was purely a local issue, and whether the erection of a steam plant by the defendant was an incident of its contract with the state penitentiary is not reviewable here.

THIS was a complaint in the nature of a bill in equity, filed in the Court of common pleas for Richmond County, South Carolina, by the Columbia Water Power Company, as plaintiff, to enjoin the Columbia Electric Street Railway, Light and Power Company from using certain water power for the propulsion of its cars, lighting its lamps and furnishing power motors, also from entering upon plaintiff's lands and erecting thereon its buildings, works and machinery; and also requiring the defendant to remove such as had already been erected, and for the payment of damages.

The bill set forth that a structure, known as the Columbia Canal, begins above the city, passes through the city near the western boundary, and empties into the Congaree River just beyond the limits of the city, passing around the shoals and falls in said river, and when constructed and in use made a continuous communication between the Broad and Congaree rivers; that the canal was begun by the State as a public work in the year 1824, and for the purpose of its construction

certain lands were purchased within the limits of the city, through which the canal was to be carried and constructed; that the canal was used for purposes of navigation for some time and remained, with the lands described, the property of the State until February 8, 1882, when the general assembly of the State by an act of that date authorized and directed the canal commission to transfer the canal, with the aforesaid lands, to the board of directors of the state penitentiary, with all the rights and appurtenances thereto acquired by the State; that the board was authorized and directed to, and subsequently did take possession of the canal and lands, and proceeded with the work of enlarging and developing the canal, expending large sums of money for that purpose, and widened and enlarged its banks, and remained in the full possession thereof until December 24, 1887, when the general assembly passed an act, (the material portions of which are printed in the margin,[1]) "to incorporate the board of trustees of the Columbia

[1] Act of December 24, 1887.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of South Carolina, now met and sitting in General Assembly, and by the authority of the same,* That the board of directors of the South Carolina penitentiary are hereby authorized, empowered and required to transfer, assign and release to the board of trustees of the Columbia Canal, hereinafter created and provided for, the property known as the Columbia Canal, together with the lands now held therewith, acquired under the acts of the general assembly of this State with reference thereto or otherwise, all and singular the rights, members and appurtenances thereto belonging; and upon such transfer, assignment and release all the right, title and interest of the State of South Carolina in and to the said Columbia Canal and the lands now held therewith, from its source at Bull's Sluice through its whole length to the point where it empties into the Congaree River, together with all the appurtenances thereunto belonging, shall vest in the said board of trustees for the use and benefit of the city of Columbia, for the purposes hereinafter in this act mentioned, subject, nevertheless, to the performance of the conditions and limitations herein prescribed on the part of the said board of trustees and their assigns: *Provided,* That should the said canal not be completed to Gervais street within seven years from the passage of this act all the rights, powers and privileges guaranteed by this act shall cease, and the said property shall revert to the State.

SEC. 2. That the said board of trustees are hereby authorized and directed, for the development of the said canal, to take into their possession the said property with all its appurtenances; and for the purpose of navigation, for

Canal, to transfer to the said board the Columbia Canal with the lands held therewith, with its appurtenances, and to develop the same," 19 So. Car. Stats. 1090; that by section one of the act the board of directors of the penitentiary was authorized to transfer and release to the board of trustees of the

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providing an adequate water power for the use of the penitentiary and for other purposes hereinafter named, they are hereby authorized, empowered and directed to improve and develop the same.

* * * * * * *

SEC. 7. That the board of trustees shall, within two years from the ratification of this act, complete the said canal so as to carry a body of water 150 feet wide at the top, 110 feet wide at the bottom and ten feet deep from the source of the canal down to Gervais street, *and furnish the State, free of charge, on the line of the canal*, 500 *horse power of water power*, to Sullivan Fenner or assigns 500 horse power of water power, under his contract with the canal commission, and to furnish the city of Columbia 500 horse power of water power at any point between the source of the canal and Gervais street the city may select; and shall, as soon as is practicable, complete the canal down to the Congaree River a few yards above the mouth of Rocky Branch: *Provided, That the right of the State to the free use of the said* 500 *horse power shall be absolute*, and any mortgage, assignment or other transfer of the said canal by the said board of trustees or their assigns shall always be subject to this right.

* * * * * * *

SEC. 21. The said board of trustees shall be, and is hereby, declared a body politic and corporate. Its corporate name shall be "Board of Trustees of the Columbia Canal." Its officers shall be a chairman, and a secretary and treasurer. It shall have a corporate seal; may make and enforce its by-laws for its government; may purchase, sell or lease lands adjoining the canal useful for the purposes of the canal; *may sell or lease the water power of the canal subject to such rules and regulations as it shall prescribe, having first provided for the State with* 500 *horse power of water power at the penitentiary*, and 500 horse power of water power for Sullivan Fenner or his assigns, and 500 horse power of water power for the city of Columbia; may sue and be sued, plead or be impleaded under their corporate name, and exercise such other powers as are hereinbefore granted, and shall fix such compensation for the services of the secretary and treasurer as they may deem proper.

Section 23 as amended by act of December 24, 1890. (20 S. C. Stats. 967.)

SEC. 23. That the said board of trustees, as soon as they have fully developed the said canal and secured the payment of the debts contracted by them in its development, they shall turn over the canal, with all its appurtenances, to the city of Columbia. But the said board of trustees shall have full power and authority, before the said canal has been fully developed and completed and turned over to the city of Columbia, to sell, alien-

canal the canal property and its lands, with their appurtenances, and that the same should vest in the trustees for the use and benefit of the city of Columbia; that such transfer was made and possession taken by the board of trustees, and the property so remained in their possession until the date and year hereinafter mentioned.

That by section twenty-one of the above act the board of trustees was declared a corporate body, and was authorized among other things to purchase, sell or lease lands adjoining the canal, useful for the purposes of the canal, to sell or lease the water power of the canal subject to such rules and regulations as it should prescribe; and that by virtue of such act the trustees became entitled to the exclusive franchise and right to sell or lease the water power developed by the canal for manufacturing and other industrial purposes, without let or hindrance, and without the right of any person or corporation to interfere or interrupt in any manner the use of such water power, save and except it should provide a certain amount of water power to certain persons and parties in said act nominated and mentioned, and that no person or corporation had a right to divert, disturb, impede or interfere with the flow of water down the said canal.

That by the twenty-third section of this act, as amended by the subsequent act of December 24, 1890, 20 So. Car. Stats. 967, the board of trustees was given full power and authority to sell, alienate and dispose of the canal, its lands and appurtenances, to any person or corporation, subject to all duties and liabilities imposed by the act, and to all contracts made by the board, prior to such transfer, upon the approval and con-

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ate and transfer the same and all its appurtenances, the lands held therewith, and all the rights and franchises conferred by this act on said board of trustees, to any person or corporation, subject, however, to all the duties and liabilities imposed thereby, and subject to all contracts, liabilities and obligations made and entered into by said board prior to such sale and transfer, upon the approval and consent of nine members of the city council of the city of Columbia; and before such sale, alienation and transfer is made thirty days' notice of the offer to purchase and the terms thereof shall be given to the council of the city of Columbia.

Approved December 24, A. D. 1890.

sent of nine members of the council of the city of Columbia; that in pursuance of such section, the trustees, before the completion of the canal, and on January 11, 1891, conveyed all of said property to the Columbia Water Power Company, the plaintiff, including the canal and all of the lands held therewith, easements, rights of way, rights of overflow and appurtenances acquired by the board of trustees, with their rights and franchises; that the plaintiff went into possession of all the property, and so remained in possession without any claim or assertion of an adverse right; and thereby became entitled to all the franchises, privileges and immunities conferred upon the board of trustees.

That the act of December 24, 1887, provided that upon the development and completion of the canal the board of trustees should furnish the State free of charge five hundred horse power of water power; and the twenty-third section of the act as amended provided that this duty should be imposed upon any person or corporation to whom the board of trustees should sell or transfer the property; that in March, 1892, the development and enlargement of the canal was completed, and on said date, and ever since, the plaintiff was and is ready to furnish the State with the five hundred horse power of water power as required by the act aforesaid.

That the defendant, a South Carolina corporation, was organized by the consolidation of three prior companies, and was authorized to construct through the city a street railway, and also to maintain a system of electric lighting; that in May, 1892, the plaintiff was informed by the board of directors of the penitentiary that the defendant company had been authorized by the said board to build a power house, with forbay, flumes and water wheels, for the purpose of utilizing the five hundred horse power to be furnished to the State, and that it was the purpose of such company to erect works under such authority to develop such power, and to furnish to the State, within the walls of the penitentiary, so much of said power as had been agreed upon by and between the board of directors of the penitentiary and the said company; that the plaintiff gave immediate notice to the said board and to the

defendant that it would object to the use of any of its lands or embankments on the west side of the canal by any person or corporation, except so much as would be necessary for the erection of the power house to furnish five hundred horse power for the use of the State; that the State should have full liberty to build such works upon the embankments of the canal as were necessary in furnishing such water power, but that such works should be strictly confined to such portion of the property of the plaintiff as should be necessary for that purpose, and that the plaintiff would not recognize the right of the State to assign such horse power, or any part thereof, to any corporation to be used for private purposes, outside of the walls of the penitentiary or any public institution of the State; and that it was under no obligation to furnish water power from the canal to be used by private corporations for private enterprises.

That subsequently the defendant, acting through the board of directors of the penitentiary, submitted plans and specifications for the erection of works for making the state water power available, and plaintiff approved of the same as not taking more of the land than was necessary for the development of the five hundred horse power for the use of the State, and allowed the defendant to proceed with its work, which was completed in accordance with the plans and specifications so submitted; but that thereafter the defendant, against the protests and objections of the plaintiff, proceeded to place in such works machinery intended solely for the purpose of running its electric lights and street railway, and furnishing power to divers persons in the city for their industries, against which plaintiff protested, and gave notice that proceedings would be taken to prevent such misapplication by the electric company, which, notwithstanding such protests, continues to place such machinery in its power house for its own private purposes; and that the plaintiff is wholly without power to prevent the action of the defendant in such misapplication of such power for its private purposes, owing to the duty of the plaintiff to furnish power for the use of the State and its penitentiary, as such power is furnished and made available at and by the same

water wheel; and that, unless such use be enjoined, it will suffer irreparable injury and damage, and its franchise to sell and lease water power for purposes of manufacturing and other industrial purposes will be affected and materially injured.

That the said defendant also in February, 1893, against the protest of the plaintiff, entered upon its premises on the western embankment of the canal and at the southern end of the power house above mentioned, and excavated and removed the earth, rock and works composing the foundation of such embankment to the great danger of the canal and embankment, and began erecting the foundations for the steam engine to be used in running generators, dynamos, etc., as above stated, and has placed portions of its machinery in such structure to be used in producing electric power, and in May, 1893, commenced to erect a boiler house and coal house for use in the same business.

The complaint further alleged that the plaintiff had performed all its obligations to the State and stood ready to continue the performance of the same, but the defendant in disregard of its rights has trespassed upon its property, excavated its embankment, and has interfered with the enjoyment of the franchises granted to it by the State; that a judgment at law against the company would be worthless, and hence the plaintiff prayed for an injunction against such use of the water power and against further trespasses upon its lands.

The answer put in issue the title of the plaintiff to the lands occupied by the defendant; denied that the board of trustees of the canal ever became entitled to the exclusive franchise and right to sell or lease water power developed by it for purposes of industrial enterprises; denied that the five hundred horse power reserved to the State was provided solely for the individual use of the State in its public institutions; denied any intent on its part to injure the plaintiff in its franchise and property by the erection of its works, and alleged that the State, being seized in fee simple of the land and entitled to the unrestricted use of the five hundred horse power referred to in the complaint, but being without means to

Counsel for Parties.

develop the same, entered into a contract dated May 26, 1892, with the defendant, whereby it was stipulated that the defendant should erect suitable works and machinery for the development of such horse power, furnish to the penitentiary so much as was necessary for its purposes, and as a consideration for this should be allowed to make use of the surplus power for its own purposes; that such contract was thereafter ratified and confirmed by an act of the general assembly, approved December 24, 1892, 21 So. Car. Stats. 94; and that the defendant was entitled under such contract to the unrestricted use of such horse power for the purposes contemplated by the contract.

The attorney general, appearing on behalf of the State, filed a suggestion to the effect that if the injunction were granted, defendant would be prevented from carrying out its agreement with the State, and the State would be deprived of the water power it was entitled to in the manner contracted for, and of the revenue it had secured under the contract. He did not, however, submit the rights of the State to the jurisdiction of the court, but insisted that the court had no jurisdiction of the subject, and asked that the complaint be dismissed.

The case came on for hearing upon the complaint, answer, the suggestion of the attorney general and the articles of agreement, and resulted in a decree dismissing the complaint. An appeal was taken to the Supreme Court of the State, which affirmed the decree of the court below, (43 So. Car. 154,) whereupon plaintiff sued out a writ of error from this court, assigning as error the decision of the Supreme Court affirming the validity of defendant's contract with the board of directors of the penitentiary, and the act of the general assembly ratifying the same.

Mr. LeRoy F. Youmans for plaintiff in error.

Mr. William H. Lyles for defendant in error. *Mr. John T. Sloan* was on his brief.

MR. JUSTICE BROWN, after stating the case, delivered the opinion of the court.

1. A preliminary motion was made to dismiss this writ of error upon the ground that no Federal question was involved, and even if there were such question, it was not "specially set up and claimed" in the state court, as required by Rev. Stat. § 709.

An examination of the complaint shows that the plaintiff relies upon the act of the general assembly of December 24, 1887. This statute (sec. 1) authorizes the board of directors of the South Carolina penitentiary, which had acquired the ownership of the canal under a previous act of February 8, 1882, to transfer the property to the board of trustees of the Columbia Canal, and (sec. 7) required the completion of the canal and *a reservation to the State, free of charge, on the line of the canal, of five hundred horse power of water power*, with a further proviso that the right of the State to the free use of the said five hundred horse power should be *absolute*, and any mortgage, assignment or other transfer of the said canal by the said board of trustees, or their assignees, should always be subject to this right. In section twenty-one this reservation is described as a provision for the State, with five hundred horse power of water power *at* the penitentiary. By section twenty-three, as amended in 1890, the board of trustees was given authority to *sell, alienate and transfer the canal*, with its appurtenances, lands and franchises, to any person or corporation, subject, however, to all contracts, liabilities and obligations made and entered into by said board prior to such sale and transfer. Pursuant to this authority, the board of trustees, on January 11, 1892, conveyed the canal and its appurtenances to the plaintiff.

The gist of the complaint is that, in 1892, the defendant, acting as the agent of the State through the board of directors of the penitentiary, submitted plans and specifications for the erection of works for making the said five hundred horse power of water power available, to which the plaintiff made no objection; but that thereafter, against its protests, proceeded to

construct in such works machinery intended for the purpose of running its electric lights and street railway and furnishing power to the citizens of Columbia for divers industries; and entered upon the premises of the plaintiff and laid foundations for a steam engine to be used in running its generators, etc., and began the erection of an engine house, boiler house and coal house for the purpose of establishing a steam plant.

The complaint did not set up the contract of the board of directors of the penitentiary with the defendant and the act of the general assembly of December, 1892, confirming the same, but these were both set forth in the answer and relied upon by the defendant as its authority for the erection of its works. In this contract the defendant agreed to erect, on the western bank of the canal opposite the penitentiary, suitable water wheels of sufficient capacity to utilize and develop the five hundred horse power of water power, and to transmit across the canal to some convenient point within the walls of the penitentiary not to exceed one hundred horse power for the use and benefit of the penitentiary. In consideration of this the board of directors agreed to allow the defendant the use of all their rights, title and interest to the land on the west side of the canal, and also to allow it the free and uninterrupted use of the said five hundred horse power of water power reserved to the penitentiary, with the exception of the one hundred horse power so reserved for its private use. This contract was subsequently ratified and confirmed by an act of the general assembly approved December 24, 1892.

While no special mention is made in the complaint of the Constitution of the United States, the whole theory of the plaintiff's case taken in connection with the answer is that the rights which it acquired to the five hundred horse power in question under the act of 1887 were impaired by the subsequent act of December 24, 1892, ratifying and approving the contract of the board of directors of the state penitentiary with the defendant. The contract of the defendant is set up in the complaint, and although the act of December, 1892, ratifying the same is not set up there, it appears in the answer and is relied upon as validating the contract; so that, reading

the complaint and answer together, the question whether the contract of the plaintiff was impaired by subsequent State action appears on the face of the pleadings.

In passing upon the case, the Supreme Court, speaking through Mr. Justice Gary, held that one of the objects of the plaintiff's action was to have the contract between the State and the defendant as to the five hundred horse power declared null and void on the ground that the State could not lease the same. In view of an intervening suggestion, filed by the attorney general, to the purport that the State had interests which would be affected by granting the relief prayed for, he held that the State, being an indispensable party and refusing to become a party, the cause of action on the equity side of the court could not be sustained; and in considering the cause of action on the law side of the court he reached the conclusion that the State was not an indispensable party. He then proceeded to consider whether the contract between the State and the defendant relative to the five hundred horse power was null and void, and held that the proviso to section seven of the act of 1887 being that the right of the State to the free use of this horse power should be *absolute*, the construction given to it by the legislature in the act of 1892 was correct, and that the word "absolute" was used for the purpose of creating a right in the State to this horse power separable and distinct from the ownership in other lands and not dependent upon any particular lands to which it might be appurtenant. It followed that the contract between the State and the defendant was not null and void.

He further held that the right of the defendant to erect the steam plant depended upon the fact whether it was merely incidental and essential to the enjoyment of the water power plant; that the parties had a right to trial by jury as to these issues, but as no demand was made therefor the court assumed that the Circuit Court properly decided all questions of fact upon which its judgment rested. The other justices concurred in the result, the Chief Justice saying that he was not satisfied that the plaintiff ever acquired title to the land upon which the works in question had been erected. There is nothing to

indicate that either of them dissented from the views expressed by Mr. Justice Gary, who presumably spoke for the court, with respect to the Federal question.

In holding that the contract with the defendant and the legislative act confirming the same were valid, the court proceeded upon the idea that the act of 1887 authorizing the transfer of the property to the board of trustees of the Columbia Canal made the reservation to the State of the five hundred horse power an absolute one; that the directors of the penitentiary could do with it as they pleased, and hence they had the right to turn it over to the defendant if, in their judgment, such course was warranted by a due regard for the interests of the State. While, in so holding, the court disposed of the case upon the construction of the contract under which the plaintiff asserted its right, such construction is no less a Federal question than would be the case if the construction of the contract were undisputed, and the point decided upon the ground that the subsequent act confirming the contract with the defendant did not impair it. The question in either case is whether the contract has been impaired, and that question may be answered either by holding that there is no contract at all, or that the plaintiff had no exclusive rights under its contract, or granting that it had such exclusive rights, that the subsequent legislation did not impair it. These are rather differences in the form of expression than in the character of the question involved, and this court has so frequently decided, notably in the very recent case of *McCullough* v. *Virginia*, 172 U. S. 102, that it is the duty of this court to determine for itself the proper construction of the contract upon which the plaintiff relies, that it must be considered no longer as an open question. *N. O. Water Works* v. *La. Sugar Co.*, 125 U. S. 18; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116.

To the argument that the Federal right was not "specially set up and claimed" in the language of Revised Statutes, section 709, it is replied that this is not one of the cases in which it is necessary to do so. Under this section there are three classes of cases in which the final decree of a state court may be reëxamined here:

COLUMBIA WATER POWER COMPANY *v.* COLUMBIA ELECTRIC STREET RAILWAY LIGHT AND POWER COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

No. 67. Argued December 6, 7, 1898. — Decided January 9, 1899.

Reading the complaint and the answer in this case together, the question whether the contract of the plaintiff was impaired by subsequent state action appears on the face of the pleadings, and this court has jurisdiction to hear and determine the case.

Under Rev. Stat. § 709 there are three classes of cases in which the final decree of a state court may be examined here: (1) where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity; (2) where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; (3) where any title, right, privilege or im-

(1) "Where is drawn in question the validity of a treaty, or statute of, or authority exercised under, the United States, and the decision is against their validity;"

(2) "Where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity;"

(3) "Or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up and claimed by either party under such Constitution, statute, commission or authority."

There is no doubt that under the third class the Federal right, title, privilege or immunity must be, with possibly some rare exceptions, specially set up or claimed to give this court jurisdiction. *Spies* v. *Illinois*, 123 U. S. 131, 181; *French* v. *Hopkins*, 124 U. S. 524; *Chappell* v. *Bradshaw*, 128 U. S. 132; *Baldwin* v. *Kansas*, 129 U. S. 52; *Leeper* v. *Texas*, 139 U. S. 462; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648.

But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here. *Miller* v. *Nicholls*, 4 Wheat. 311; *Willson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245; *Satterlee* v. *Matthewson*, 2 Pet. 380, 410; *Fisher's Lessee* v. *Cockerell*, 5 Pet. 248; *Crowell* v. *Randell*, 10 Pet. 368; *Harris* v. *Dennie*, 3 Pet. 292; *Farney* v. *Towle*, 1 Black, 350; *Hoyt* v. *Shelden*, 1 Black, 518; *Railroad Co.* v. *Rock*, 4 Wall. 177; *Furman* v. *Nichol*, 8 Wall. 44; *Kaukauna Co.* v. *Green Bay &c. Canal*, 142 U. S. 254.

The case under consideration falls within the second class,

and, as it appears from the record and from the opinion of the court, which may be examined for that purpose, (*Kreiger* v. *Shelby Railroad*, 125 U. S. 39,) that the question was presented and decided, that the act of 1892, affirming the validity of defendant's contract with the board of directors of the state penitentiary did not impair the obligation of plaintiff's contract, evidenced by the act of 1887, because that act properly construed conveyed no exclusive rights, we think the Federal question sufficiently appears.

2. Upon the merits the case presents but little difficulty. The argument of the plaintiff is that under the act of 1887 the board of trustees of the Columbia Canal, of which plaintiff is the successor, took an absolute title to the canal and appurtenant lands, with the right to "purchase, sell or lease lands adjoining the canal useful for purposes of the canal," and to "sell or lease the water power of the canal, subject to such rules and regulations as it shall prescribe, having first provided the State with five hundred horse power of water power at the penitentiary," for the individual use of the penitentiary alone, and with no right to lease or sublet it to others for private gain. In support of this contention, plaintiff relies not only upon the act of 1887, under which it takes title, but upon certain prior acts of the general assembly.

Thus, under section two of the act of September 21, 1866, "to provide for the establishment of a penitentiary," 13 So. Car. Stats. No. 4797, p. 393, it was made the duty of the commission "to select and procure a proper site, at some point if practicable where water power may be made available for manufacturing purposes within the enclosure, on which to erect suitable penitentiary buildings." And by a subsequent act, approved December 19, 1866, 13 So. Car. Stats. 408, the commissioners, who had been authorized by a previous act of December 18, 1865, to sell and convey the Columbia Canal, were authorized to sell it at public or private sale, at their discretion, provided that at any sale that may be made by said commissioners, there be made a reservation to the State of water power *sufficient for the purposes of the state penitentiary* for all time free of charge. In a subsequent act of

September 21, 1868, 14 So. Car. Stats. 83, the commissioners were vested by section four with like authority to sell at public or private sale, with a similar reservation to the State of water power sufficient for the purposes of the state penitentiary for all time free of charge. In another act, approved March 12, 1878, 16 So. Car. Stats. 444, to provide for the disposal of the Columbia Canal, there was also a proviso in section four that, "in all grants that may be made, sufficient power shall be reserved to the State *for the use of the penitentiary and the* city of Columbia." So, too, in an act of February 8, 1882, 17 So. Car. Stats. 855, to authorize the canal company to transfer the canal and lands to the board of directors of the penitentiary, it was provided that the board of directors should take possession on behalf of the State of the canal with its appurtenances, and, *for the purpose of providing an adequate water power for the use of the penitentiary*, were authorized to improve and develop the same. By section six of the same act they were authorized "to furnish to the city of Columbia, for the purpose of operating its water works and other purposes, five hundred horse power of water power; . . . and after reserving *for the use of the penitentiary* a power sufficient to meet *the demands of its ordinary operations and other industries conducted and carried on within its walls*, they are further authorized, with the comptroller general on behalf of the State, to lease to other persons or corporations water power upon such terms and upon such annual rental per horse power as in their judgment may be proper, and also to lease such mill sites along the line of the said canal as may be owned by the State, upon such terms as may be deemed most advantageous to the interest of the State."

It will be observed that these acts are progressively liberal to the State; that the earlier ones contemplated the use of the water power only for manufacturing purposes within the walls of the penitentiary, while the later ones indicated that such power was also reserved for the use of the city of Columbia, for the purpose of operating its water works and other purposes, as well as for leasing to others. But however cogent these acts might be to indicate that the object of the State

was to reserve to the individual use of the penitentiary the five hundred horse power, it is equally clear that the act of 1887 is decisive of a change of purpose in that regard; and in providing that the right of the State to the free use of its amount of water power should be *absolute*, it meant that the directors of the penitentiary should make such use of it as they pleased, regardless of prior acts, and the immediate requirements of the penitentiary. The clearer the reservation for the individual use of the penitentiary may have formerly been, the clearer the change of purpose becomes manifest by the use of the word "absolute." The theory of the plaintiff is that by the use of this word was meant simply the right of the State to the free use of the said five hundred horse power, unaffected by any mutations of ownership. This, however, was already secured to the State by the previous clause of section seven, requiring the board of trustees "to furnish to the State, free of charge, on the line of the canal, five hundred horse power of water power." Nor are the requirements of this word met by treating it as the equivalent of "perpetual" or "for all time." In construing statutes words are taken in their ordinary sense. No authority can be found for such a definition of the word "absolute;" nor does the context suggest it. Its most ordinary signification is "unrestricted" or "unconditional." Thus, an absolute estate in land is an estate in fee simple. 2 Bl. Com. 104; *Johnson* v. *McIntosh*, 8 Wheat. 543, 588; *Fuller* v. *Misroon*, 35 So. Car. 314, 332; *Johnson* v. *Johnson*, 32 Alabama, 637; *Converse* v. *Kellogg*, 7 Barb. 590, 599. In the law of insurance, that is an absolute interest in property which is so completely vested in the individual that there could be no danger of his being deprived of it without his own consent. *Hough* v. *City Fire Ins. Co.*, 29 Conn. 10; *Reynolds* v. *State Mutual Ins. Co.*, 2 Grant's Cases, 326; *Washington Fire Ins. Co.* v. *Kelly*, 32 Maryland, 421.

We have no doubt that in providing that the right of the State should be absolute, it was intended to permit the board of directors to do exactly what was done in this case, *i.e.* to lease such portion of the five hundred horse power as was not required for the individual use of the penitentiary. Indeed,

we perceive no other reason for the insertion of this clause. The right to use it in the penitentiary was already amply secured by clauses so frequently inserted in prior acts that no question of construction could be raised upon them, and when the act of 1887 went still further it was evidently upon the idea that the power not necessary for the penitentiary should not be wasted, but should be applied to such other uses as were conducive to the interests of the State. While the leasing of the same to the defendant may have been for private gain, the lighting of the city by electricity and the establishment of street railways was manifestly a public purpose.

If plaintiff's theory were sound the penitentiary would be unable to make use of its reserved water power unless it were also possessed of the requisite means to establish a plant, while under its actual arrangement with the defendant it grants to the latter its surplus water power, and in consideration thereof receives all such power as is necessary for its own purposes, and in addition thereto a substantial annual revenue for its other needs.

3. The remaining question as to injuries threatened and inflicted upon plaintiff's property by the entry of the defendant upon the western embankment of the canal, the digging, excavating and removal of the earth, and the erection of buildings and machinery thereon, does not demand an extended consideration. The court of common pleas found that plaintiff was owner of the property upon which these works were erected, but that the State, having the right to the five hundred horse power, had also the incidental right to lease the same to the defendant, which took thereby the right to put its electric plant upon the banks of the canal, as well as the supplementary right to put in a steam plant to be used at times when the water power was unavailable, by reason of freshets or by necessary repairs to the canal or other causes. The Supreme Court did not expressly pass upon the validity of plaintiff's title to the land, but held that whether the contract conferred upon the defendant the right to erect a steam plant depended upon the fact whether it was merely incidental to or essential to the enjoyment of the water

plant; and that no jury having been demanded, the court must assume that the Circuit Judge decided this question properly; and even if there were error on his part in the finding of fact, it was not the subject of review by the Supreme Court in a law case. It needs no argument to show that neither of these rulings involved a Federal question. Whether plaintiff had a legal title to the lands was purely a local issue, and whether the erection of a steam plant by the defendant was an incident of its contract with the state penitentiary is, for the reason stated by the Supreme Court, not reviewable here.

In addition to this, however, the deed through which the State and the plaintiff derived their title is not in evidence before us. The answer admitted that the State did acquire a strip of land lying within the boundaries described in the bill, but denied that the buildings erected by the defendant "at any point touched upon said strip of land." The State appeared to have derived title from one Rawls, whose deed was filed in the state court, but does not appear in the record before us, and the Supreme Court of the State found that it could not review the finding of the court below to the effect that the plaintiff was the owner in fee of the land.

The decree of the Supreme Court of South Carolina is therefore

Affirmed.